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No. 1015

In the

Supreme Court of the United States

OCTOBER TERM, 1963

82

TEXAS STATE AFL-CIO, ANTONIO AGUILAR, JULIA AMAYA, *et al*,

Petitioners,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL, and RAYMOND F. FARRELL, COMMISSIONER OF IMMIGRATION AND NATURALIZATION,

Government Respondents,

and

THOMAS ALVARADO (LUGO), CARLOTTA ARELLANES (LEYVA), CONCEPCION AURORA CAGIGAS FRAIJO, *et al*

Intervenor Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinion Below	2
Jurisdiction	3
Questions Presented	3
Statutes Involved	5
Statement of the Case	5
Reasons for Granting the Writ	9
Conclusion	19
Appendix A	1a
Appendix B	23a
Appendix C	29a
Appendix D	31a

AUTHORITIES CITED

Cases:	Page
Alabama Power Co. v. Ickes, 302 U.S. 464, 58 S.Ct. 300, 82 L.ed 374 (1938)	14
Amalgamated Meat Cutters v. Rogers, 186 F. Supp. 114, 119	6, 9, 20
American President Lines v. Federal Maritime Board, 112 F.Supp. 346 (1953)	15
American Trucking Ass'n. v. United States, 364 U.S. 1, 4 L.ed. 2d 1527, 80 S.Ct. 1570	18
Atchison, Topeka and Santa Fe Ry. Co. v. Somerfield, 97 U.S. App. D.C. 325, 229 F.2d 777	18

Cases—(Continued) Page

Bantam Books v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.ed. 2d 584 (1963) 13, 15

City of Chicago v. Santa Fe R. Co., 357 U.S. 77, 78 S.Ct. 1063, 2 L.ed. 2d 1174 (1958) 18

Copper Plumbing and Heating Co. v. Campbell, 110 U.S. App. D.C. 177, 290 F.2d 368 (1961) 18

Cramp v. Board of Public Instruction, 368 U.S. 278, 82 S.Ct. 275, 7 L.ed 285 (1961) 18

F.C.C. v. N.B.C. (KOA), 319 U.S. 239, 63 S.Ct. 1035, 87 L.ed. 1374 14

F.C.C. v. Sanders Brothers Radio Station, 309 U.S. 470, 60 S.Ct. 693, 84 L.ed. 869 (1940) 14

Matter of J——P——, 9 I & N Dec. 591 (March 19, 1962) 11

International Union of Electrical Workers v. United States, 108 U.S. App. D.C. 97, 280 F.2d 645 (1960) 17

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 95 L.ed. 817, 71 S.Ct. 624 18

Kansas City Power & Light Co. v. McKay, 96 U.S. App. D.C. 273, 225 F.2d 924, cert. denied 350 U.S. 884 (1955) 14

National Coal Ass'n v. Federal Power Commission, 89 U.S. App. D.C. 135, 191 F.2d 462 (1951) 17

Cases—(Continued) Page

Perkins v. Lukens Steel Co., 310 U.S. 113, 60 S.Ct. 869, 84 L.ed. 1108 18

Power Reactor Development Co. v. International Union of Electrical Workers, 367 U.S. 396, 81 S.Ct. 1529, 6 L.ed. 2d 924 (1961) 17

Rusk v. Cort, 369 U.S. 367, 7 L.ed. 2d 809, 82 S.Ct. 787 19

Scripps-Howard Radio v. F.C.C., 316 U.S. 4, 62 S.Ct. 875, 86 L.ed. 1229 (1942) 14

Tennessee Electric Power Co. v. T.V.A., 306 U.S. 118, 59 S.Ct. 366, 83 L.ed. 543 (1939) 14

United States v. Dickson, 15 Pet. 162, 10 L.ed. 689 (1841) 13

Statutes:

28 U.S.C. §1254(1) 3

Immigration and Nationality Act of 1952 (66 Stat. 163, 8 U.S.C. §1101 *et seq.*) 5

Section 101(a)(15)(H) 4, 16

Section 214 4

Administrative Procedure Act of 1946 (60 Stat. 237, *et seq.*, 5 U.S.C. §1001 *et seq.*) 5

Section 10(a) 14, 15

Other Authorities: Page

Davis, Administrative Law Treatise, Vol. 3 ..... 14, 15

1962 County and City Data Book, U. S. Department of Commerce, Bureau of the Census 7

Gordon & Rosenfield, "Immigration Law and Procedure," (1959) p. 127 6

House Report on the 1952 Immigration and Nationality Act, 1952 U.S. Code & Cong. News 12, 16

Jaffe, Standing to Secure Judicial Review; Public Actions, 74 Harv. L. Rev. 1265 (1961) 15

Jaffe, Standing to Secure Judicial Review; Private Actions, 75 Harv. L. Rev. 225 (1961) 15

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Intervenor Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners[1] respectfully pray that a writ of

[1]Petitioners are the Texas State AFL-CIO, a labor organization, and the following 180 individuals: Antonio Aguilar, Julia Amaya, Arthur Lee Avant, Herman James Backler, Thomas Barlow, Antonio Bocanegra, Ramon Casarez, Henry A. De La Garza, Gregorio Del Rio, Roberto C. Dominguez, Ernestina Enriquez, Armando Garcia, George Graddy, Jr., Leonard H. Henley, Guadalupe Hernandez, Aloys J. Kesl, Hector V. Leon, Jack L. Mahaffey, Alberto Martinez, Augustine Marquez, George E. Montuth, James T. Nakovic, Altagracia B. Ocon, Jesus Ocon, Carlos Pacheco, Hector Pacheco, Angel Rodriguez, Leonardo Ruiz, Angel Salazar, Jose H. Salazar, Enrique Sanchez, Joe Dale Scott, Carlos I. Soto, James Sprecker, Armando Tellez, Roberto Tellez, Bernardino Torres, Armando Vargas, Daniel B. Villegas, James E. Wright, Severo Adame, Armando Barragan, Ramona G. Bill, Hector F. Castro, Vicente Esquivel, Emeterio Favela, Jr., Jose S. Garza, Francisco Guanajuato, Guadalupe E. Guz-

certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above case. Judgment was entered on February 6, 1964, and Petition for Rehearing was denied on March 18, 1964.

Opinion Below

The United States District Court for the District of Columbia dismissed this action without opinion.[2] The original opinion of the Court of Appeals has not yet been officially reported. It is unofficially reported, however, at 49 CCH LC ¶18,843, and is

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man, Preciliano B. Ibarra, Jose G. Jimenez, Salavador Jimenez, Arturo Martinez, Juan R. Martinez, Manuel Nieto, Ramiro Olivares, Rogelio Patino, Jose Barrera Salas, Juanita C. Salas, Esperanza G. Sandoval, Margarito Sandoval, Felix San Miguel, Jr., Josefina G. San Miguel, Juan Hernandez Tristan, Enrique Villegas, Pedro Aguero, Sr., Felix Alva, Velia Barragan, Gilberto Cantu, Rodolfo Cantu, Toribio G. Cantu, Martiniano Cardenas, Ernesto Chavez, Jesus Chavez, Ruperto Chavez, Manuel Cruz, Theodore R. Delapass, Andres Dimas, Leopoldo Dominguez, Dolores Elizondo, Francisco Fernandez, Nieves E. Gallardo, Arturo V. Garcia, Ramon Garcia, Victor M. Garcia, Martha Gonzalez, Rufino Granado, Rafael Guerra, Maria Jesus Hernandez, Ramon Hilaro, Jose A. Juarez, Jr., Aida Leyva, Santiago R. Licon, Daniel Lombrano, Diana Lozano, Julia Maldonado, Roas Maria Maldonado, Celestino Mata, Encernacion Mata, Jose Mata, Jose Mendoza, Heriberto Molina, Benito Moreno, Carlos Moreno, Jr., Maria Azucena Moreno, Maria Guadalupe Moreno, Oscar Noriega, Reynaldo C. Paez, Hector L. Pearson, Jose G. Quintanilla, Jose Angel Ramirez, Alfredo Andres Ramon, Jr., Pable Renteria, Antonio D. Rodriguez, Jesus M. Rodriguez, Roberto Rodriguez, Tiburcio Rodriguez, Juan Rogerio, Oscar M. Rogerio, Ricardo Rogerio, Raul Sanchez, Juan Saenz, Aniceto M. Sauceda, Emilia M. Sauceda, Ernestina Schunior, Ildefonso Sernz, Jr., Leopoldo Serna, Blas Solis, Genero S. Solis, Carlota C. Tijerina, Lino Torres, Daniel M. Valdez, Alberto Vargas, Abraham Vasquez, Adelina Vasquez, Cruz Vasquez, Mary Becerra, Maria N. Canales, Elidia Cano, Ernestina C. Garcia, Roberto Garcia, Leonelo H. Gonzalez, Antonio Hernandez, Roberto Martinez, Jose I. Ramirez, Jose Garza Ramos, Jr., Basilio Reyes, Jose Saenz, Marcelo M. Soliz, Hermila Soto, Eleno Soza, Ofelia Vasquez, Alfredo Z. Alanis, Ernesto Z. Alaniz, Raul Atkinson, Juan M. Balli, Juvenino Barbosa, Ralph Delgado, Feliciana E. Elizondo, Oralia Elizondo, Francisco Fuentes, Jose C. Garcia, Manuel S. Garcia, Jessie Garnello, Telesforo Garza, Guillermo C. Hernandez, Tomas Hull, Manuel Moran, Maruicio Moran, Victor Manuel Moran, Jesus Moreno, Juan Pena, Rodolfo Revuelta, Daniel Rodriguez, Manuel Rodriguez, Elijio Ruth, Alfonso A. Trevino, Eliseo S. Trevino, Jose R. S. Trevino and Jose Villegas.

[2] The District Court Judgment may be found at p. 8 of the Joint Appendix in the Record.

printed in Appendix B (pp. 23a-28a), *infra*. The Order of March 18, 1964, amending the Court of Appeals opinion, is printed in Appendix C (pp. 29a-30a), *infra*. The Order of March 23, 1964, vacating the aforesaid March 18 Order and further amending the said opinion, is printed in Appendix D (pp. 31a-32a), *infra*.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on February 6, 1964. Timely petition for rehearing was overruled on March 18, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether 188 individual plaintiffs, representing a class of thousands of working people who reside in Texas counties bordering on Mexico, who have suffered unemployment because thirty to fifty thousand Mexican commuters cross the border daily to employment in the United States, have suffered a "legal wrong" or have been "adversely affected"—

(a) by the action of the United States immigration authorities in according such Mexican commuters the status of *immigrants* "lawfully admitted for permanent residence" although such commuters fail to establish or maintain residence in the United States pursuant to the Immigration and Nationality Act of 1952, and

(b) by the refusal of said immigration author-

ities to require such commuting aliens to enter only as *non-immigrants* under Sections 101(a)(15)(H)(ii) and 214 of said Act, which provide, as a requisite for entry and employment of aliens entering to perform "services or labor," that "unemployed persons capable of performing such service or labor cannot be found in this country" and that the admission of such aliens "shall be for such time and under such conditions as the Attorney General may by regulations prescribe,"

and whether, therefore, said 188 plaintiffs have standing under the Administrative Procedure Act to seek judicial review of such action and inaction by said agency.

2. Whether a labor organization has standing to seek judicial review of such action and inaction by said agency—

(a) when such labor organization represents members of the same class as the aforesaid individual plaintiffs,

(b) when it and its component labor unions have suffered from said agency action and inaction because said commuting aliens have provided employers with a virtually endless supply of workers who are willing to work for low wages and, because of their precarious status as "immigrants" and their residence in a foreign country, are almost guaranteed to be non-union.

(c) when said commuting aliens prevent or discourage labor organizations in this country

from engaging in legitimate strike activity because said aliens provide an available source of strike breakers, and

(d) when the judicial review here sought concerns statutory provisions which were expressly included in the aforesaid Act, in response to the pleas of organized labor, to "provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country."

3. Whether, under the Immigration and Nationality Act of 1952, the status of aliens "lawfully admitted for permanent residence" may be conferred upon and retained by Mexican nationals who fail to establish or maintain residence in the United States, who continue to reside in Mexico and who commute daily to employment in the United States.

Statutes Involved

The statutes involved and referred to herein are the Administrative Procedure Act of 1946 (60 Stat. 237, *et seq.*, 5 U.S.C. §1001 *et seq.*) and the Immigration and Nationality Act of 1952 (66 Stat. 163, 8 U.S.C. §1101 *et seq.*), pertinent provisions of which are set out verbatim in Appendix A (pp. 1a-23a).

Statement of the Case

This is an action for injunctive relief in the nature of mandamus and for a declaratory judg-

ment in which residents of the Texas border communties of El Paso, Del Rio, Laredo, McAllen, and Brownsville, joined by the state-wide Texas State AFL-CIO, seek relief from a high level of unemployment and a low level of wages caused by the practice of Mexican residents using their status as *aliens admitted for permanent residence in the United States* as an "amiable fiction"[3] to permit them to commute daily across the Rio Grande to employment in this country. Government respondents, who are charged with administration of the immigration laws, admit that they have "knowingly permitted" the entry of such commuters "having the status of aliens lawfully admitted for permanent residence under the Immigration and Nationality Act of 1952." [J.A. 28]

There is no way of knowing the exact number of these "immigrants" who reside in Mexico and commute to employment in this country. Nor is there any way to determine the identity of such persons, for the United States government maintains no records differentiating such commuters from bona fide immigrants who actually reside in the United States. The commuter's status, being fictional, is not mentioned in any statute or in any federal regulation. The record, however, discloses estimates of 30,000 to 50,000 such persons who commute daily. [J.A. 17, 71, 78, and 84].[4] The

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[3] A term used by District Judge Luther Youngdahl in *Amalgamated Meat Cutters v. Rogers*, 186 F. Supp. 114, 119, quoting Gordon & Rosenfield, "Immigration Law and Procedure," (1959) p. 127.

[4] In order to determine the number of aliens coming to work locally in El Paso from Juarez, the Immigration and Naturalization Service conducted a "survey" at the border crossing stations [J.A. 78].

record also discloses an established practice whereby commuters furnish United States addresses to employers and governmental officials [J.A. 71-72, 78].

Because the commuters enter and work in United States border cities without regulation, many U. S. residents have been driven out of the employment market in those cities,[5] and wages have been depressed to substandard levels. The commuter accepts low wages because he and his family reside across the border where living costs and living standards tend to be substantially below those prevailing in the United States. Commuter wages tend to be so low that a Department of Labor Report, on file herein, characterized them as "symbolic of peonage." [J.A. 72][6] Another Department of Labor Report concluded that "the willingness of the commuter alien to work for possibly substandard wages

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[5] Unemployment rates in the border counties of Texas are among the highest in the United States. The trial court was asked to take judicial notice of the following data in the 1962 *County and City Data Book*, U. S. Department of Commerce, Bureau of the Census (identified by page, table and item):

In 1960, the rate of unemployment for the United States as a whole was 5.1% (p. 4, Table 1, Item 35). At the same time, the rate for the State of Texas as a whole was much more favorable: 4.5% (p. 4, Table 1, Item 35). The most populous Texas counties along the Mexican border, which are also the counties suffering from the unregulated influx of alien commuters, showed the following rates of unemployment for the same period:

Cameron County (Brownsville) 8.4% (p. 354, Table 2, Item 35)
El Paso County 6.5% (p. 354, Table 2, Item 35)
Hidalgo County (McAllen) 6.3% (p. 364, Table 2, Item 35)
Maverick County (Eagle Pass) 15.1% (p. 364, Table 2, Item 35)
Val Verde County (Del Rio) 6.7% (p. 374, Table 2, Item 35)
Webb County (Laredo) 10.4% (p. 374, Table 2, Item 35)

[6] Illustrative wages paid to commuters in Laredo, according to said Department of Labor Report, were $60 per month for hotel maids, $20 for a 96-hour week for hotel hall boys, $25 per week for drug store cashiers, and $17 per week for grocery checkers, etc. [J.A. 74].

necessarily impairs the domestic power to bargain for better rates." [J.A. 77]

Petitioners, seeking to conduct their own war on poverty in their own communities—poverty directly traceable to the double standard which allows commuters to retain resident status without actual residence—brought this action to obtain judicial review of the commuter program. The Complaint alleged, and petitioners were prepared to prove, that

> "Each of said individual plaintiffs has been unemployed for various periods during the years 1960 and 1961, at a time when commuting aliens with I-151 border crossing identification cards[7] were working at jobs in the United States which plaintiffs were capable of performing. Said plaintiffs are typical and representative of tens of thousands of persons similarly situated along the Rio Grande River who have been unemployed while commuting aliens were working at jobs which residents were capable of performing. . . ." [J.A. 20]

The Complaint also alleged the following:

> "Defendants have largely ignored the provisions of Title 8 U.S.C. §§1101(a)(15)(H) and 1184 as a source of alien labor which can be made available without displacing the employment of workers in the United States. Instead, defendants have knowingly permitted the use of permanent resident alien status by commuting aliens who are residents of contiguous foreign territory. By this 'amiable fiction,' I-

[7] The identification card given *all* immigrants admitted for permanent residence in the United States.

> 151 border crossing identification cards, which are designed solely for issuance to bona fide residents of the United States with a current status of permanent resident alien, are used as a device to permit daily commutation entry of residents of a foreign country for the sole purpose of engaging in employment in the United States. Such use violates the Act, and is in derogation of the letter and intent of said Act regarding use of the express provisions referred to herein above, and also Title 8 U.S.C. §1182(a)(14), for entry of aliens to engage in employment under conditions which will safeguard domestic labor." [J.A. 17]

The trial court dismissed the action without trial on the merits and without opinion. The foregoing allegations in the complaint, however, were never contested. On review, the Court of Appeals held that

> "Assuming the truth of the crucial allegations of the complaint. . . . this is not enough to give the plaintiffs-appellants standing to sue the defendant officials for declaratory and injunctive relief."

Reasons for Granting the Writ

1. The only court which has written on the merits of the issue posed by this case is the District Court for the District of Columbia in *Amalgamated Meat Cutters v. Rogers,* 186 F.Supp. 114 (1960) in which Judge Youngdahl raised this threshold question:

> "Are commuters aliens lawfully admitted for permanent residence? If not, can they be so treated administratively for the limited pur-

pose of permitting their employment in the United States?"

His opinion answered with the applicable statutory definitions:

> "The term 'lawfully admitted for permanent residence' is defined by §101(a)(20) of the Act, 8 U.S.C.A. §1101(a)(20) as:
>
> > 'the status of having been lawfully accorded the privilege of *residing* permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.' (Emphasis added.)
>
> "The term 'residence' is defined by §101(a)(33) of the Act, 8 U.S.C.A. §1101(a)((33) as:
>
> > 'the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. * * *' "

He therefore concluded and held as follows:

> "With these legislative statements as a guide, it is clear that Mexican commuters do not reside in the United States, and *it therefore is not possible for them to be aliens lawfully admitted for permanent residence.* This should not mean, however, that Mexicans or Canadians cannot commute to work in the United States. *The defendants can utilize the documentary requirements and administrative procedures they think best under the applicable law* [under §§101(a)(15)(H)(ii) and 214] *for*

> *aliens who work in this country and live in Mexico or Canada.* If the defendants are satisfied that an alien can enter the United States to work here, they could then permit the alien to commute." (186 F.Supp. 118-119, emphasis added.)

As in the instant case, the defendant immigration authorities questioned the standing of the plaintiff labor union to bring suit in *Amalgamated v. Rogers,* but the district court overruled that contention.

Significantly, the immigration authorities did not appeal from the decision in the *Amalgamated* case. They complied and followed the Judgment as to all of the commuters who were involved in that action—commuters from Juarez who were working at the strike-bound Peyton Packing Co. in El Paso.[a]

Certiorari should be granted so that the law may be clarified both as to the merits of petitioner's action and as to the standing of a labor union to bring such a suit as a spokesman for working people who are directly affected by the commuter practice. As the law now stands, a final judgment exists in the *Amalgamated* case declaring that it is not possible for commuters residing in Mexico "to be

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[a] One of the published decisions of the Board of Immigration Appeals involves a Peyton commuter who moved to El Paso to retain his immigrant status, but later moved back to Juarez for reasons which dramatically illustrated the economic harm contained in such an unregulated system where an employee may live in a low cost economy yet work in competition with employees who live in a high cost economy. *Matter of J__P__*, 9 I & N Dec. 591 (March 19, 1962). Appellant J__P__ testified that when he and his wife moved to El Paso, "his paycheck, after deductions, was not sufficient to permit him to live in El Paso except under the poorest conditions. Therefore they returned to Juarez."

lawfully admitted for permanent residence," yet the immigration authorities are not giving general application to that interpretation, although that ruling was never appealed. Furthermore, by holding that plaintiffs in the instant action lack standing to sue, the Court of Appeals rendered a determination of the question on the merits impossible, for the practical effect of that court's holding was that the statutory questions raised herein are unreviewable.

2. Unless certiorari is granted, thousands of United States residents along the Mexican border will be left without a remedy. Petitioners at every stage of this proceeding have asked the question: who if not they are more aggrieved by the government's failure to apply the terms of the Immigration and Nationality Act as it was written and as it was intended by Congress?[9]

No one, be it district court, Court of Appeals, government respondents, or intervenor respondents, have supplied an answer. But the answer is obvious: nobody. The Attorney General of the United States is the chief defendant in this action. He is charged by law with the administration of the Act in question, and therefore, it is his acts and his omissions which are questioned herein. The Court

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[9] The 1952 Act, unlike the prior statute, made *permanent residence* a condition for immigrant status. See House Report (H. Report 1365, 82d Cong. U.S. Code & Cong. News, pp. 1678, 1684). The statutory provisions which the immigration authorities should have used to allow entry of aliens for purposes of employment only were provisions enacted in response to the pleas of organized labor to "provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country." *Ibid.*, p. 1707.

of Appeals failed to grasp the problem when it wrote that "Normally any challenge to their [the commuters'] status would be brought by the Government officials immediately concerned," for the government officials immediately concerned have obviously refused to act, which is what this case is all about.

As this Court wrote many years ago in another case involving reversal of an administrative interpretation of a statute, in *United States v. Dickson,* 15 Pet. 162, 10 L.ed 689 (1841),

> ". . . it is not to be forgotten that ours is a government of laws and not of men, and that the judicial department has imposed upon it by the Constitution the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it."

3. The decision of the Court of Appeals conflicts with principles laid down by this Court on the question standing.

In *Bantam Books v. Sullivan,* 372 U.S. 58, 83 S.Ct. 631, 9 L.ed 2d 584 (1963), this Court found standing where "appellants have in fact suffered a palpable injury," which in that case resulted from state action that impaired the sale of books published by appellants. The Court held that distribution of a state commission's notices that certain books were objectionable for sale, distribution or display to

youths under 18 years of age "impaired sales of the listed publications . . . [which] establishes that appellants suffered injury. It was a legal injury. . . ."

In *F.C.C. v. Sanders Brothers Radio Station,* 309 U.S. 470, 60 S.Ct. 693, 84 L.ed 869 (1940), in *Scripps-Howard Radio v. F.C.C.,* 316 U.S. 4, 62 S.Ct. 875, 86 L.ed 1228 (1942), and *F.C.C. v. N.B.C. (KOA),* 319 U.S. 239, 63 S.Ct. 1035, 87 L.ed 1374, this Court "enuncated the principle that one whose only interest in attacking the administrative action is to avoid a new or increased competition has standing to make the attack, even though it is specifically recognized that the attacker has no 'legal right' at stake."[10]

In the instant case, the Court of Appeals relied upon *Tennessee Electric Power Co. v. T.V.A.,* 306 U.S. 118, 59 S.Ct. 366, 83 L.ed 543 (1939), *Alabama Power Co. v. Ickes,* 302 U.S. 464, 58 S.Ct. 300, 82 L.ed 374 (1938), which this Court decided prior to passage of the Administrative Procedure Act, and upon *Kansas City Power & Light Co. v. McKay,* 96 U.S. App. D.C. 273, 225 F.ed 924, in which certiorari was denied, 350 U.S. 884 (1955). The D. C. Court of Appeals had held in the *Kansas City Power* case that §10(a) of the Administrative Procedure Act "is for the benefit of 'any person suffering legal wrong,' that is, one whose legal rights have been violated," but rejected the view that the phrase in the APA, "Any person . . . adversely affected or aggrieved" conferred standing to sue on a competitor who fears adverse economic effects as a result of

[10] Kenneth Culp Davis, Administrative Law Treatise, Vol. 3, p. 221.

official agency action—a view held by Judge Holtzoff in *American President Lines v. Federal Maritime Board,* 112 F.Supp. 346, 349 (1953).

It would appear, from footnote 6 in the *Bantam Books case,* 372 U.S. 64, that Judge Holtzhoff's view is correct; however, the lingering adherence to a narrow reading of Section 10(a), illustrated by the *Kansas City Power* case and the instant case, shows a need for elucidation on the question of whether the *Sanders* doctrine is applicable to all administrative action subject to Section 10(a) of the APA.

Professor Davis[11] has concluded that the *Sanders* doctrine is applicable to all administrative action subject to section 10(a) of the APA, because

> "The Sanders case was decided under a statutory provision allowing review upon application of a 'person aggrived or whose interests are adversely affected, . . . [and] the Administrative Procedure Act allows judicial review upon application of 'Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute. . . ."[12]

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[11] *ibid,* p. 219

[12] The divergence of opinion between such distinguished authorities as Professors Davis and Jaffe [Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265 (1961); Jaffe, Standing to Secure Judicial Review; Private Actions, 75 Harv. L. Rev. 225 (1961)] only points up the need for judicial clarification. Professor Jaffe reads the word "relevant" in §10(a) as seeming "to limit standing clauses in particular statutes to actions under those or perhaps under closely related statutes." (75 Harv. L. Rev. 288) He observes that "If the APA had meant to make the test grievance in fact, most of the provision becomes unnecessary." Davis, however, while noting that the "legislative history is not entirely free from conflicting views" is of the opinion that "The solid part of the legislative history is . . . the statement of the Senate and House committees that one who is 'adversely affected in fact' may challenge administrative action."

Certainly, the interests of plaintiffs in the instant case were *adversely affected* by the agency action but they were also *"adversely affected within the meaning of" the Immigration and Nationality Act of 1952,* a "relevant" statute under Professor Jaffe's analysis.[13] The Court of Appeals may have written in terms of "mere economic competition" for jobs by the plaintiffs, but plaintiffs' grievances were greater than that, for Congress had granted the individual plaintiffs, and the class they represent, *a statutory right to be free of job competitions by aliens* "unless unemployed pesons capable of performing such service or labor cannot be found in this country." §101(a)(15)(H). The original opinion of the Court of Appeals omitted reference to this statutory right, although in response to petition for rehearing the Court stated that

> "We have given full weight to these contentions in reaching our conclusion that the union and the individual plaintiffs have no standing to bring this suit." p. 32a, *infra.*

It did not, however, explain why §101(a)(15)(H) and related sections failed to confer standing on the very persons who were to have been protected by these statutory "safeguards."[14]

The Court of Appeals also failed to reconcile the

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[13] See footnote 12, *supra.*

[14] The House Report on the 1952 Act noted that the bill adopts "a principle of selectivity in the allocation of . . . permits for temporary residence on the basis of the need for labor and services of aliens, . . . [and] provides strong safeguards for American labor." p. 1705, 1952 U.S. Code & Cong. News. See also footnote 9, *supra.*

conflict between its holding in the instant case and its prior holdings in the following cases:

(a) *International Union of Electrical Workers v. United States,* 108 U.S. App. D.C. 97, 280 F.2d 645 (1960), in which labor unions were held to have standing to challenge an Atomic Energy Commission order which authorized construction of a nuclear power reactor. The court held that the unions were "aggrieved" by the action of the Commission. The unions' intervention was based on the contention that building of the reactor would "create a hazard which will place the individual Intervenors, the members of the UAW and their families, and the UAW in danger of an explosion or other incident' damaging to the individuals and their homes, real estate values, and employment; that the value of collective bargaining contracts 'will be seriously impaired if the PRDC reactor is built in this area without reasonable assurances of safety. . . .'" [This case was reviewed by the Supreme Court without consideration of the standing of the unions to bring the action. *Power Reactor Development Co. v. International Union of Electrical Workers,* 367 U.S. 396, 81 S.Ct. 1529, 6 L.ed 2d 924 (1961).]

(b) *National Coal Ass'n v. Federal Power Commission,* 89 U.S. App. D.C. 135, 191 F.2d 462 (1951), in which the Court of Appeals recognized the standing of labor unions representing coal miners and railroad employees to challenge the granting of a Federal Power Commission certificate for construction of a natural gas pipeline, on the basis that their members would lose employment because of the de-

crease in business by the railroads which would result from construction of the pipeline.

(c) *Atchison, Topeka and Santa Fe Ry. Co. v. Somerfield,* 97 U.S. App. D.C. 325, 229 F.2d 777, in which a railroad was held to have standing, based on its investment in special equipment, to challenge validity of three cent airmail postal service.

(d) *Copper Plumbing and Heating Co. v. Campbell,* 110 U.S. App. D.C. 177, 290 F.2d 368 (1961), in which the Court of Appeals held that a company could challenge a listing of its name that had the effect of barring it from future government contracts for three years, on grounds that it was "prohibited from competing on an equal basis with others in the same industry," thus distinguishing the case from *Perkins v. Lukens Steel Co.,* 310 U.S. 113, 60 S.Ct. 869, 84 L.ed 1108, where "plaintiffs could not show 'an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law.' "

The decision of the Court of Appeals in the instant case runs counter to principles contained in the following Supreme Court decisions: *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 140-141, 95 L.ed. 817, 71 S.Ct. 624; *Cramp v. Board of Public Instruction,* 368 U.S. 278, 82 S.Ct. 275, 7 L.ed. 285 (1961); *City of Chicago v. Santa Fe R. Co.,* 357 U.S. 77, 78 S.Ct. 1063, 2 L.ed. 2d 1174 (1958); *American Trucking Ass'n v. United States,* 364 U.S. 1, 4 L.ed 2d 1527, 80 S.Ct. 1570.

Cf. *Rusk v. Cort,* 369 U.S. 367, 7 L.ed. 2d 809, 82 S.Ct. 787, in which the Supreme Court announced that "the Court will not hold that the broadly remedial provisions of the Administrative Procedure Act are unavailable to review administrative decisions under the 1952 [Immigration and Nationality] Act in the absence of clear and convincing evidence that Congress so intended." [369 U.S. 379-380].

Conclusion

For the foregoing reasons, petitioners pray that writ of certiorari be granted. The issues posed by this case are of vital immediate importance to thousands of persons and to the economic health of the many communities which border on Mexico.

It is a truism to note that under our constitutional division of powers the executive arm of the government cannot have the final voice in interpreting the meaning of a statute which it administers. Yet, if the plaintiffs herein have no standing to bring an action to review agency determination that affects them in particular, then, as a practical matter, there can be no judicial review of the executive's interpretation of the statute, even though that interpretation relates to a general course of conduct and does not turn on disputed issues of fact.

We have demonstrated the need to clarify the law on standing to bring suit, as affected by the Administrative Procedure Act. We have noted the conflict between the instant decision and principles enuciated by this Court. We have also noted the

conflict with other decisions of the same Court of Appeals. We submit that these are strong and valid grounds for granting the writ. Perhaps most important of all, however, is the necessity that ordinary citizens be able to raise legitimate complaints about governmental action which affects them personally. The courthouse door should not be shut to these plaintiffs, and this is certainly true in the instant case, where the cause of action is meritorious.

Certiorari should be granted on all questions presented, including the third question, for there are no factual issues to determine, and as found by the only court which has passed on the merits of the dispute (in *Amalgamated v. Rogers*, supra), commuters who reside in Mexico do not have the status of aliens admitted for permanent residence in the United States.

Respectfully submitted,

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June 15, 1964

APPENDIX A

Statutes Involved

The following provisions of the Administrative Procedure Act are involved:

5 U.S.C §1001 [Sec. 2, 1946, 60 Stat. 237]. Definitions

As used in this Act—

* * * * *

(c) Rule and rule making.—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

* * * * *

5 U.S.C. §1002 [Sec. 3, 60 Stat. 238]. Public Information

Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of any agency—

(a) Rules.—Every agency shall separately state

and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

* * * * *

5 U.S.C. §1003 [Sec. 4, 60 Stat. 238]. Rule Making

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) Notice. — General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall

include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

* * * * *

5 U.S.C. §1009 [Sec. 10, 60 Stat. 243]. Judicial Review

Except so far as (1) statutes preclude judicial re-

view or (2) agency action is by law commited to agency discretion.

(a) Right of review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and venue of action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence of inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Reviewable acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review.

* * * * *

(e) Scope of review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of

any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

The following provisions of the Immigration and Nationality Act (Act of June 27, 1952, 66 Stat. 163, 8 U.S.C. 1101 *et seq.*) are also involved:

8 U.S.C. §1101 [Sec. 101]. Definitions

(a) as used in this chapter—

* * * * *

(3) The term "alien" means any person not a citizen or national of the United States.

(4) The term "application for admission" has

reference to the application for admission into the United States and not to the application for the issuance of an immigrant or nonimmigrant visa.

(5) The term "Attorney General" means the Attorney General of the United States.

(6) The term "border crossing identification card" means a document of identity bearing that designation issued to an alien who is lawfully admitted for permanent residence, or to an alien who is a resident in foreign contiguous territory, by a consular officer or an immigration officer for the purpose of crossing over the borders between the United States and foreign contiguous territory in accordance with such conditions for its issuance and use as may be prescribed by regulations.

* * * * *

(13) The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided,* That no person whose departure from the United States was occasioned by

deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.

* * * * *

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of non-immigrant aliens—

* * * * *

(B) An alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;

* * * * *

(D) an alien crewman serving in good faith as such in any capacity required for normal operation and service on board a vessel (other than a fishing vessel having its home port or an operating base in the United States) or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft;

(E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and

children of any such alien if accompanying or following to join him: (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national; or (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital;

* * * * *

(H) an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform temporary services of an exceptional nature requiring such merit and ability; or (ii) who is coming temporarily to the United States to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country; or (iii) who is coming temporarily to the United States as an industrial trainee;

(I) upon a basis or reciprocity, an alien who is a bona fide representative of foreign press, radio, film, or other foreign information media, who seeks to enter the United States solely to engage in such vocation, and the spouse and children of such a representative, if accompanying or following to join him.

(16) The term "immigrant visa" means an immigrant visa required by this chapter and properly issued by a consular officer at his office outside of the United States to an eligible immigrant under the provisions of this chapter.

(17) The term "immigration laws" includes this chapter and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, deportation, or expulsion of aliens.

* * * * *

(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

(21) The term "national" means a person owing permanent allegiance to a state.

(22) The term "national of the United States" means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

* * * * *

(26) The term "nonimmigrant visa" means a visa properly issued to an alien as an eligible nonimmigrant by a competent officer as provided in this chapter.

(27) The term "nonquota immigrant" means—

(A) an immigrant who is the child or the spouse of a citizen of the United States;

(B) an immigrant, lawfully admitted for

permanent residence, who is returning from a temporary visit abroad;

(C) an immigrant who was born in Canada, the Republic of Mexico, the Republic of Cuba, the Republic of Haiti, the Dominican Republic, the Canal Zone, or an independent country of Central or South America, and the spouse or the child of any such immigrant, if accompanying or following to join him;

* * * * *

(F) (i) an immigrant who continuously for at least two years immediately preceding the time of his application for admission to the United States has been, and who seeks to enter the United States solely for the purpose of carrying on the vocation of minister of a religious denomination, and whose services are needed by such religious denomination having a bona fide organization in the United States; and (ii) the spouse or the child of any such immigrant, if accompanying or following to join him; or

* * * * *

(31) The term "permanent" means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law.

(32) The term "quota immigrant" means any immigrant who is not a nonquota immigrant. An

alien who is not particularly specified in this chapter as a nonquota immigrant or a nonimmigrant shall not be admitted or considered in any manner to be either a nonquota immigrant or a nonimmigrant notwithstanding his relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration.

(33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of sections 1482 and 1484 of this title where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States.

8 U.S.C. §1181 [Sec. 211]. Admission into the United States—Documentary requirements

(a) No immigrant shall be admitted into the United States unless at the time of application for admission he (1) has a valid unexpired immigrant visa or was born subsequent to the issuance of such immigrant visa of the accompanying parent, (2) is properly chargeable to the quota specified in the immigrant visa, (3) is a nonquota immigrant if specified as such in the immigrant visa, (4) is of the proper status under the quota specified in the immigrant visa, and (5) is otherwise admissible under this chapter.

Readmission after temporary departure

(b) Notwithstanding the provisions of section 1182(a)(20) of this title, in such cases or in such classes of cases and under such conditions as may be by regulations prescribed, otherwise admissible aliens lawfully admitted for permanent residence who depart from the United States temporarily may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation.

* * * * *

(e) Every alien making application for admission as an immigrant shall present a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General.

8 U.S.C. §1182 [Sec. 212]. Excludable classes of aliens; non-applicability to certain aliens

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(14) Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, if the Secretary of Labor has determined and certified to the Secretary of State and to the At-

torney General that (A) sufficient workers in the United States who are able, willing, and qualified are available at the time (of application for a visa and for admission to the United States) and place (to which the alien is destined) to perform such skilled or unskilled labor, or (B) the employment of such aliens will adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply only to the following classes: (i) those aliens described in the nonpreference category of section 1153(a)(4) of this title, (ii) those aliens described in section 1101(a)(27)(C), (27)(D), or (27)(E) of this title (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence, unless their services are determined by the Attorney General to be needed urgently in the United States because of the high education, technical training, specialized experience, or exceptional ability of such immigrants and to be substantially beneficial prospectively to the national economy, cultural interest or welfare of the United States;

* * * * *

(19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact;

(20) Except as otherwise specifically provided in

this chapter, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 1181(e) of this title;

* * * * *

(25) Aliens (other than aliens who have been lawfully admitted for permanent residence and who are returning from a temporary visit abroad) over sixteen years of age, physically capable of reading, who cannot read and understand some language or dialect;

(26) Any nonimmigrant who is not in possession of (A) a passport valid for a minimum period of six months from the date of the expiration of the initial period of his admission or contemplated initial period of stay authorizing him to return to the country from which he came or to proceed to and enter some other country during such period; and (B) at the time of application for admission a valid nonimmigrant visa or border crossing identification card;

* * * * *

(c) Aliens lawfully admitted for permanent residence who temporarily proceeded abroad volun-

tarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25), (30), and (31) of subsection (a) of this section. Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title.

8 U.S.C. §1184 [Sec. 214]. Admission of nonimmigrants —Regulations

(a) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United States.

Presumption of status; written waiver

(b) Every alien shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status under section 1101(a)(15) of

this title. An alien who is an officer or employee of any foreign government or of any international organization entitled to enjoy privileges, exemptions, and immunities under the International Organizations Immunities Act, or an alien who is the attendant, servant, employee, or member of the immediate family of any such alien shall not be entitled to apply for or receive an immigrant visa, or to enter the United States as an immigrant unless he executes a written waiver in the same form and substance as is prescribed by section 1257(b) of this title.

(c) The question of importing any alien as a nonimmigrant under section 1101(a)(15)(H) of this title in any specific case or specific cases shall be determined by the Attorney General after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition, shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant.

8 U.S.C. §1201 [Sec. 221].

* * * * *

Non-issuance of visas or other documents

(g) No visa or other documentation shall be issued to an alien if (1) it appears to the consular officer, from statements in the application, or in the

papers submitted therewith, that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law, (2) the application fails to comply with the provisions of this chapter, or the regulations issued thereunder, or (3) the consular officer knows or has reason to believe that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law: *Provided,* That a visa or other documentation may be issued to an alien who is within the purview of subsection (a) (7) or (15) of section 1182 of this title, if such alien is otherwise entitled to receive a visa or other documentation, upon receipt of notice by the consular officer from the Attorney General of the giving of a bond or undertaking providing indemnity as in the case of aliens admitted under section 1183 of this title.

Nonadmission upon arrival

(h) Nothing in this chapter shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to enter the United States, if, upon arrival at a port of entry in the United States, he is found to be inadmissible under this chapter, or any other provision of law. The substance of this subsection shall appear upon every visa application.

8 U.S.C. §1202 [Sec. 222]. Application for visas—Immigrant visas

(a) Every alien applying for an immigrant visa

and for alien registration shall make application therefor in such form and manner and at such place as shall be by regulations prescribed. In the application the immigrant shall state his full and true name, and any other name which he has used or by which he has been known; age and sex; race and ethnic classification; the date and place of his birth; present address and places of previous residences; whether married or single, and the names and places of residence of spouse and children, if any; calling or occupation; personal description (including height, complexion, color of hair and eyes, and marks of identification); languages he can speak, read, or write; names and addresses of parents, and if neither parent living then the name and address of his next of kin in the country from which he comes; port of entry into the United States; final destination, if any, beyond the port of entry; whether he has a ticket through to such final destination; whether going to join a relative or friend, and, if so, the name and complete address of such relative or friend; the purpose for which he is going to the United States; the length of time he intends to remain in the United States; whether or not he intends to remain in the United States permanently; whether he was ever arrested, convicted or was ever in prison or almshouse; whether he has ever been the beneficiary of a pardon or an amnesty; whether he has ever been treated in an institution or hospital or other place for insanity or other mental disease; if he claims to be a preference quota or a nonquota immigrant, the facts on which he bases such claim; whether or not he is a member

of any class of individuals excluded from admission into the United States, or whether he claims to be exempt from exclusion under the immigration laws; and such additional information necessary to the identification of the applicant and the enforcement of the immigration and nationality laws as may be by regulations prescribed.

* * * * *

Signing and verification of application

(e) Except as may be otherwise prescribed by regulations, each copy of an application required by this section shall be signed by the applicant in the presence of the consular officer, and verified by the oath of the applicant administered by the consular officer. One copy of the application for an immigrant visa, when visaed by the consular officer, shall become the immigrant visa, and the other copy shall be disposed of as may be by regulations prescribed. The application for a nonimmigrant visa or other documentation as a nonimmigrant shall be disposed of as may be by regulations prescribed. The issuance of a nonimmigrant visa shall, except as may be otherwise by regulations prescribed, be evidenced by a stamp placed by the consular officer in the alien's passport.

8 U.S.C. §1203 [Sec. 223]. Re-entry permit—Application; contents

(a) (1) Any alien lawfully admitted for permanent residence, or (2) any alien lawfully admitted to the United States pursuant to clause 6 of section

3 of the Immigration Act of 1924, between July 1, 1924, and July 5, 1932, both dates inclusive, who intends to depart temporarily from the United States may make application to the Attorney General for a permit to reenter the United States, stating the length of his intended absence or absences, and the reasons therefor. Such applications shall be made under oath, and shall be in such form, contain such information, and be accompanied by such photographs of the applicant as may be by regulations prescribed.

Issuance of permit: extension

(b) If the Attorney General finds (1) that the applicant under subsection (a)(1) of this section has been lawfully admitted to the United States for permanent residence, or that the applicant under subsection (a)(2) of this section has since admission maintained the status required of him at the time of his admission and such applicant desires to visit abroad and to return to the United States to resume the status existing at the time of his departure for such visit, (2) that the application is made in good faith, and (3) that the alien's proposed departure from the United States would not be contrary to the interests of the United States, the Attorney General may, in his discretion, issue the permit, which shall be valid for not more than one year from the date of issuance: *Provided,* That the Attorney General may in his discretion extend the validity of the permit for a period or periods not exceeding one year in the aggregate. The permit shall be in such form as shall be by regulations

prescribed for the complete identification of the alien.

Multiple reentries

(c) During the period of validity, such permit may be used by the alien in making one or more applications for reentry into the United States.

Presented and surrendered

(d) Upon the return of the alien to the United States the permit shall be presented to the immigration officer at the port of entry, and upon the expiration of its validity, the permit shall be surrendered to the Service.

Permit in lieu of visa

(e) A permit issued under this section in the possession of the person to whom issued, shall be accepted in lieu of any visa which otherwise would be required from such person under this chapter. Otherwise a permit issued under this section shall have no effect under the immigration laws except to show that the alien to whom it was issued is returning from a temporary visit abroad; but nothing in this section shall be construed as making such permit the exclusive means of establishing that the alien is so returning.

8 U.S.C. §1259 [Sec. 249]. Record of admission for permanent residence in the case of certain aliens who entered the United States prior to July 1, 1924

(a) A record of lawful admission for permanent residence may, in the discretion of the Attorney

General and under such regulations as he may prescribe, be made in the case of any alien, if no such record is otherwise available and such alien shall satisfy the Attorney General that he—

(1) entered the United States prior to July 1, 1924;

(2) has had his residence in the United States continuously since such entry;

(3) is a person of good moral character;

(4) is not subject to deportation; and

(5) is not ineligible to citizenship.

(b) An alien in respect of whom a record of admission has been made as authorized by subsection (a) of this section, shall be deemed to have been lawfully admitted to the United States for permanent residence as of the date of his entry prior to July 1, 1924.

8 U.S.C. §1329 [Sec. 279]. Jurisdiction of District Courts

The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this title. It shall be the duty of the United States attorney of the proper district to prosecute every such suit when brought by the United States. Notwithstanding any other law, such prosecutions or suits may be instituted at any place in the United States at which the violation may occur or at which the person charged with

a violation under section 275 or 276 may be apprehended. No suit or proceeding for a violation of any of the provisions of this title shall be settled, compromised, or discontinued without the consent of the court in which it is pending and any such settlement, compromise, or discontinuances shall be entered of record with the reasons therefor.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,976

TEXAS STATE AFL-CIO, *et al., Appellants,*

v.

ROBERT F. KENNEDY, Attorney General of the United States, and Raymond F. Farrell, Commissioner of the United States Immigration and Naturalization Service, *et al., Appellees.*

Appeal from the United States District Court for the District of Columbia

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Decided February 6, 1964

Mr. Charles J. Morris, of the bar of the Supreme Court of Texas, *pro hac vice,* by special leave of court, with whom *Messrs. J. Albert Woll* and *L. N. D. Wells, Jr.*, were on the brief, for appellants.

Mr. Robert C. Mayer also entered an appearance for appellants.

Mr. Gil Zimmerman, Assistant United States Attorney, with whom *Messrs. David C. Acheson,* United States Attorney, *Frank Q. Nebeker* and *David Epstein,* Assistant United States Attorneys, were on the brief, for appellees Kennedy and Farrell.

Mr. Michael J. Shea, with whom *Mr. Martin L. Friedman* was on the brief, for appellee Thomas Alvarado (Lugo), and certain other appellees.

Before WASHINGTON, DANAHER and MCGOWAN, Circuit Judges.

WASHINGTON, *Circuit Judge*: This litigation was brought in the District Court by a labor organization active in the Texas counties bordering on Mexico, and by individual workers employed in those counties, to obtain injunctive and declaratory relief against the United States immigration authorities, seeking to cause the expulsion or exclusion of a certain group of Mexican aliens permitted by those authorities to enter Texas, and to obtain and keep jobs there, in alleged violation of law. This relief would free the plaintiffs-appellants from the competition offered in the local labor market by these aliens. The Mexicans in question are individuals who have been given by the Federal authorities (defendants-appellees) the status of lawfully admitted "immigrants," entitled to permanent residence in this country. They have also been permitted by the

defendants-appellees to become so-called "alien commuters," i.e., persons who continue to maintain their homes in Mexico, but who are allowed to cross the border at frequent intervals to pursue their established employment in the United States. This permitted practice has prevailed for some decades, and many thousands of these aliens are said to be holding jobs in the United States, without either residing here or spending any major part of their earnings here.[1]

The plaintiff labor organization sued in a representative capacity on behalf of its members and its affiliated labor groups. In addition, some 188 individuals alleging economic detriment from the activities of the alien commuters sued as plaintiffs on their own behalf and as representatives of others similarly situated. The sole defendants named in the complaint were the two principal Government officials charged with the administration and enforcement of the immigration laws. Some 19 alien commuters intervened as defendants, individually and as representatives of a class. Motions for summary judgment were filed by all parties, and all the defendants moved to dismiss. The motions to dismiss were granted, and the plaintiffs' motion for summary judgment was denied. This appeal followed.

Much of the argument addressed to us relates to

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[1] The complaint also asked relief, though this was not as strongly urged, with respect to a similar group of Canadians allowed to enter the United States under like conditions to obtain work in American communities near the Canadian-American border.

the merits of the controversy, namely, whether "alien commuters" are entitled under the law to enjoy the privileges which have long been extended to them.[2] But we do not think it is either necessary or proper for us to express a view on this question.

Assuming the truth of the crucial allegations of the complaint brought by plaintiffs-appellants — namely, that expulsion or exclusion of the alien commuters would result in many jobs becoming available to the individual plaintiffs, or would at least reduce the competition faced by them in seeking employment, that the union is handicapped in its activities by the presence of the alien commuters, and that the latter are employed in this country only because the Government officials charged with the enforcement of the immigration laws have illegally permitted them to enter and to work here—this is not enough to give the plaintiffs-appellants standing to sue the defendant officials for declaratory and injunctive relief. Congress has not given them any such standing by express or implied provision of statute—either in the immigra-

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[2] Appellants' main contention on the merits is that the Immigration and Nationality Act of 1952, 8 U.S.C. §§1101 *et seq.*, "contains no provisions to grant permanent resident alien status to aliens who continue to reside in a foreign country, and who desire to enter the United States solely for daily employment as international commuters." Appellants argue that alien commuters cannot be regarded as "aliens lawfully admitted for permanent residence," as permanent residence here has not in fact been achieved, and hence they are not entitled to the privileges of aliens admitted for such residence.

The Government's argument on the merits is essentially based on long-standing administrative application of the immigration laws, before and after the passage of the 1952 Act, so as to permit the practices here attacked. The 1952 Act, says the Government, was drafted in full awareness of these practices by the Congress, and in effect continued them. The Government further argues that an alien who has "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant," see 8 U.S.C. §1101(a)(20), does not forfeit that status by becoming a commuter.

tion laws or in any other act. Absent such a congressional grant, mere economic competition made possible by governmental action (even if allegedly illegal) does not give standing to sue in the courts to restrain such action. *Tennessee Electric Power Co. v. Tennessee Valley Authority,* 306 U.S. 118 (1939); *Alabama Power Co. v. Ickles,* 302 U.S. 464 (1938); *Kansas City Power & Light Co. v. McKay,* 96 U.S. App. D.C. 273, 225 F.2d 924, cert. denied, 350 U.S. 884 (1955).[3] Even more emphatically must this be so where the competition complained of is sought to be eliminated by the wholesale expulsion or exclusion from this country of persons who have entered in reliance on our laws as interpreted and administered by the officials in charge.

It is quite true that an alien whose status here is threatened by action of our Government is generally granted standing to sue the responsible officials to vindicate his rights in our courts. See, for example, *Estrada v. Ahrens,* 296 F.2d 690 (5th Cir. 1961). But it does not follow that an alien's status may be judicially attacked by those with competitive interests adverse to his. The present case involves the rights of many thousands of human beings to continued employment in this country. Those persons are entitled to have their status and their rights adjudicated on the particular facts of their own cases, the circumstances of their entry, the representations made to them, the nature of their own conduct, and any other factors which

[3] Appellants rely on Amalgamated Meat Cutters v. Rogers, 186 F.Supp. 114 (D.D.C. 1960). That case, however, is not persuasive authority for the maintenance of suits of the present sort.

might reasonably be urged on their behalf. Normally any challenge to their status would be brought by the Government officials immediately concerned. It is doubtful indeed whether the legality of the presence in this country of a particular named alien can properly be attacked in a suit brought by a private individual who alleges that he was and is entitled to have the job now held by the alien, and that but for the latter's tenure of the job he would in fact be holding it and enjoying its rewards. Certainly it would be most unjust to allow a labor organization and its members to attack the status of many thousands of aliens—not even naming them as individual defendants—with the aim of dislodging them from their jobs, so that those jobs might then perhaps be obtained for union members. To deny standing to a union and its members to bring such a suit is entirely consistent with the rulings in the *Tennessee, Alabama Power,* and *Kansas City* cases, cited above, which denied standing in fairly comparable situations to corporations and their stockholders.

For these reasons, the order of the District Court, dismissing the complaint, will be

Affirmed.

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,976

TEXAS STATE AFL-CIO, *et al., Appellants,*

v.

ROBERT F. KENNEDY, Attorney General of the United States, and Raymond F. Farrell, Commissioner of the United States Immigration and Naturalization Service, *et al., Appellees.*

Before: Washington, Circuit Judge, in Chambers.

ORDER

It is ORDERED by the court, sua sponte, that the opinion in the above-entitled case is hereby amended as follows:

On line 28 of page 5 there shall be inserted after the word "members" Footnote 4 and at the conclusion of page 5 the following footnote shall appear:

> "Though the individual plaintiffs do not identify themselves as union members, but rather as immigrants who have taken up residence in the United States, their interests seem substantially those of the union and its members. They allege that they have been unemployed at various periods during the years 1960 and 1961, "at a time when commuting aliens with I-151 border crossing cards were working at jobs in the United States which plaintiffs were capable

of performing." They further say in the complaint:

> "Defendants have largely ignored the provisions of Title 8, U.S.C. §§1101(a)(15)(H) and 1184 as a source of alien labor which can be made available without displacing the employment of workers in the United States. Instead, defendants have knowingly permitted the use of permanent resident alien status by commuting aliens who are residents of contiguous foreign territory. By this 'amiable fiction,' I-151 border crossing cards, which are designed solely for issuance to bona fide residents of the United States with a current status of permanent resident alien, are used as a device to permit daily commutation entry of residents of a foreign country for the sole purpose of engaging in employment in the United States. Such use violates the Act, and is in derogation of the letter and intent of said Act regarding use of the express provisions referred to herein above, and also Title 8 U.S.C. §1182(a)(14), for entry of aliens to engage in employment under conditions which will safeguard domestic labor."

We have given full weight to these contentions in reaching our conclusion that the union and the individual plaintiffs have no standing to bring this suit.

Dated: March 18, 1964

APPENDIX D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,976

TEXAS STATE AFL-CIO, *et al., Appellants,*

v.

ROBERT F. KENNEDY, Attorney General of the United States, and Raymond F. Farrell, Commissioner of the United States Immigration and Naturalization Service, *et al., Appellees.*

Before: Washington, Circuit Judge, in Chambers.

ORDER

It is ORDERED, sua sponte, that the order dated March 18, 1964, is hereby vacated, and it is

FURTHER ORDERED, sua sponte, that the opinion in the above-entitled case is hereby amended as follows:

On line 28 of page 5 there shall be inserted after the word "members" Footnote 4 and at the conclusion of page 5 the following footnote shall appear:

> "Though the individual plaintiffs do not identify themselves as union members, but rather as residents of the United States, their interests seem substantially those of the union and its members. They allege that they have been unemployed at various periods during the years 1960 and 1961, "at a time when commuting aliens with I-151

border crossing cards were working at jobs in the United States which plaintiffs were capable of performing." They further say in the compaint:

> "Defendants have largely ignored the provisions of Title 8, U.S.C. §§1101 (a) (15) (H) and 1184 as a source of alien labor which can be made available without displacing the employment of workers in the United States. Instead, defendants have knowingly permitted the use of permanent resident alien status by commuting aliens who are residents of contiguous foreign territory. By this 'amiable fiction,' I-151 border crossing identification cards, which are designed solely for issuance to bona fide residents of the United States with a current status of permanent resident alien, are used as a device to permit daily commutation entry of residents of a foreign country for the sole purpose of engaging in employment in the United States. Such use violates the Act, and is in derogation of the letter and intent of said Act regarding use of the express provisions referred to herein above, and also Title 8 U.S.C. §1182(a) (14), for entry of aliens to engage in employment under conditions which will safeguard domestic labor."

We have given full weight to these contentions in reaching our conclusion that the union and the individual plaintiffs have no standing to bring this suit.

Dated: March 23, 1964

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	3
Argument	10
I. Petitioners' Case "On The Merits" Is Fatally Defective	10
II. The Decision Below on the Issue of Standing Is Correct and in Accordance with Decisions on This Issue	14
Conclusion	17
Appendix A	1a
Appendix B	2a
Appendix C	8a

CITATIONS

CASES:

Alabama Power Co. v. Ickes, 302 U.S. 464 (1938)	16
Amalgamated Meat Cutters v. Rogers, 186 F. Supp. 114 (D.D.C. 1960)	10
Atchison, Topeka & Santa Fe Ry. v. Somerfield, 97 U.S. App. D.C. 325, 229 F. 2d 777 (1955)	17
Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)	16
Braude v. Wirtz, Civil No. 63-1459-TC, S.D. Cal., June 1, 1964	15, 16
City of Chicago v. Santa Fe Ry., 357 U.S. 77 (1958)	16
Copper Plumbing & Heating Co. v. Campbell, 110 U.S. App. D.C. 177, 290 F. 2d 368 (1961)	16
Cramp v. Board of Public Instruction, 368 U.S. 278 (1961)	16
FCC v. NBC, 319 U.S. 239 (1943)	16

Page

FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940) 16
Ferrer v. Fronton Exhibition Co., 188 F. 2d 954 (5th Cir. 1954) 15
Harisiades v. Shaughnessy, 342 U.S. 580, 596-7 (1952) 9
International Union of Electrical Workers v. United States, 108 U.S. App. D.C. 97, 280 F. 2d 645 (1960) 16
Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U. S. 123 (1951) 16
Kansas City Power & Light Co. v. McKay, 96 U.S. App. D.C. 273, 225 F.2d 924, cert. denied, 350 U.S. 884 (1955) 16
Karnuth v. United States ex rel. Albro, 279 U.S. 231 (1929) 13
Matter of F—, unreported, A-6300563, B.I.A. (Dec. 30, 1946) 3, 4
Matter of H—O—, 5 I. & N. Dec. 716 (1954) 4, 11, 13
Matter of L—, 4 I. & N. Dec. 454 (1951) 11
Matter of M—, 6 I. & N. Dec. 533 (1955) 13
Matter of M—, D—S—, 8 I. & N. Dec. 209 (1958) 4
National Coal Ass'n. v. Federal Power Commission, 89 U.S. App. D.C. 135, 191 F. 2d 462 (1951) 16
Pennsylvania R.R. v. Dillon, Civil No. 17753, D.C. Cir., June 26, 1964 16
Rusk v. Cort, 369 U.S. 367 (1962) 15
Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942) 16
Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118 (1939) 16

STATUTES:

Immigration and Nationality Act of 1952:

66 Stat. 163, *et seq.*, 8 U.S.C. 1101, *et seq.* 1
§ 101(a)(15)(H), 8 U.S.C. § 1101(a)(15)(H) ..10, 12
§ 101(a)(20), 8 U.S.C. § 1101(a)(20) 2, 11
§ 106, 8 U.S.C. § 1105(a) (Supp. 1963) 15
§ 212(a)(14), 8 U.S.C. § 1182(a)(14) 9, 10
§ 316(a), 8 U.S.C. § 1427(a) 2, 12
§ 401(a),(d),(e), 8 U.S.C. § 1106(a)(d)(e) 3, 8

MISCELLANEOUS:

H. Rep. No. 1365, 82d Cong., 2d Sess. (1952), reproduced in U. S. Code Cong. & Adm. News (1952) at p. 1705 13

Page

H. Rep. No. 1086, 87th Cong., 1st Sess., (1961) reproduced in U. S. Code Cong. & Adm. News, at p. 2966-2977 15

Staff of Sub-Comm. No. 1, House Comm. on the Judiciary, 88th Cong., 1st Sess., Study of Population and Immigration Problems, Administrative Presentations (III), Admission of Aliens Into the United States for Temporary Employment, and "Commuter Workers" (Comm. Print 1963) 8, 11

1962 County and City Data Book, U.S. Department of Commerce, Bureau of the Census 14

Area Labor Market Trends, U. S. Department of Labor, December 1962 Supplement 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 182

TEXAS STATE AFL-CIO, ANTONIO AGUILAR, JULIA AMAYA, ET AL, *Petitioners*,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL, and RAYMOND F. FARRELL, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, *Government Respondents*,

and

TOMAS ALVARADO (LUGO), CARLOTTA ARELLANES (LEYVA), CONCEPCION AURORA CAGIGAS FRAIJO, ET AL, *Intervenor Respondents*.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

BRIEF FOR INTERVENOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The United States District Court for the District of Columbia dismissed this action without opinion. (J.A. 108).[1] The opinion of the Court of Appeals

[1] "J.A." Refers to the Joint Appendix in the Record.

(App. B of Petition, pp. 23a-28a) is reported at 330 F. 2d 217. The Court's opinion was amended and supplemented by an Order dated March 23, 1964 (App. D of Petition, pp. 31a-32a).

JURISDICTION

The Petition adequately outlines the basis upon which the jurisdiction of this Court is invoked.

QUESTION PRESENTED

Whether a labor organization and the residents of five Texas counties have standing to sue the Attorney General and the Commissioner of Immigration and Naturalization in order to seek a change in the classification of "commuters"[2] by United States Immigration officials from a classification of "immigrant" to one of "non-immigrant" and thereby to cancel the status and rights acquired by commuters under United States immigration laws.

STATUTES INVOLVED

The statute involved in this suit is the Immigration and Nationality Act of 1952 (66 Stat. 163 *et seq.*, 8 U.S.C. § 1101, *et seq.*). In addition to the portions of this statute set forth in the Appendix to the Petition (App. A of Petition, pp. 1a-23a), Intervenor Respondents point to Section 316(a), (66 Stat. 242

[2] The term "commuter" as used in this brief describes an alien who has been classified by the United States immigration officials as an immigrant and afforded the *privilege* of permanent residence in the United States as one "lawfully admitted for permanent residence" in accordance with Section 101(a)(20), 8 U.S.C. § 1101(a)(20) of the 1952 Immigration and Nationality Act and who commutes to a place of employment in the United States from his home in foreign contiguous territory, i.e., Mexico or Canada.

(1952), 8 U.S.C. § 1427(a)), and to Section 401(a), (d) and (e), (66 Stat. 274 (1952), 8 U.S.C. § 1106(a), (d) and (e)) of the Act. These additional portions of the statute are set forth in Appendix A to this brief.

STATEMENT

In this litigation a Texas labor organization and 188 residents of five Texas counties seek, through the judicial arm of the government, to bring about a sudden, fundamental, and dramatic change in the administration of the United States immigration laws. Petitioners, in effect, seek through the instrumentality of the courts, to bring an end to the commuter program presently in effect along the entire United States-Mexican and United States-Canadian borders. This program, in its present form, dates back to 1927. It is a part of reciprocal relations among the United States, Canada, and Mexico. *Matter of F—*, unreported, A-6300563, B.I.A. (Dec. 30, 1946).

Petitioners challenge the classification conferred on each and every commuter by United States immigration officials. Since 1927 these officials have consistently and continuously classified commuters as "immigrants." Petitioners, with no valid basis, as will be shown in the Argument portion of this Brief *infra*, contend that commuters should be classified instead as "non-immigrants." Petitioners' contention flies in the face of the law and of 37 years of consistent administrative practice by the agency charged with administering the law. (Argument, *infra*) Petitioners would also sweep aside—with resulting sudden and staggering hardship to the commuter and his dependents—the classification status and rights which have been conferred through the years on commuters by United States immigration officials.

The Commuter Program

Since 1927 United States immigration authorities have consistently classified and conferred upon commuters (1) the status of "immigrants"[3] and (2) the status of being "lawfully admitted for permanent residence." Like all immigrants, commuters have been afforded the *privilege* of residing permanently in the United States. The Immigration Service has never required that the commuter exercise the privilege of establishing permanent residence in the United States in order to maintain his status.

A discussion as to the origin of the commuter program (it emerged from discussions on "high diplomatic levels")[4] and its operation is set forth in the opinion of the Board of Immigration Appeals in *Matter of M— D— S—*, 8 I. & N. Dec. 209 (1958). A copy of this opinion is set forth in Appendix B to this brief.

In 1954, the Board of Immigration Appeals in *Matter of H— O—*, 51 I. & N. Dec. 716 (1954), considered the question whether the Immigration and Nationality Act of 1952 in any way changed the long established commuter practice. The Board in a carefully considered and well documented opinion expressed its conclusion that it did not. A copy of the Board's

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[3] In contrast to a classification of "non-immigrant." An immigrant is afforded the privilege of establishing permanent residence in the United States. A non-immigrant is not. An immigrant may in time become a naturalized U. S. citizen; a non-immigrant may not. There are several other differences between the two classifications.

[4] See also *Matter of F—*, unreported, A-6300563, B.I.A. (Dec. 30, 1946), where the Board of Immigration Appeals refers to the commuter program as "part of reciprocal arrangements with Canada and Mexico."

decision is attached hereto as Appendix C to this brief. Petitioners' contention is that the 1952 Act "outlawed" the commuter program. The Board stated its conclusion as to this question at page 718 of the opinion:

> "It is therefore concluded that the practice of considering commuters as permanent residents has not been disturbed by the act of 1952, *but rather it has impliedly received congressional approval, since the legislative history of the act reveals a discusion (sic) without dissent.*" (Emphasis supplied)

Grave Importance Of This Suit To Commuters

On December 30, 1961, Tomas Alvarado (Lugo) and eighteen other commuters petitioned the District Court for leave to intervene as defendants in this action both as individuals and as representatives of the class of Mexican commuters. (J.A. 30-33) Each Applicant for Intervention was a Mexican citizen (1) who had been classified by the Immigration and Naturalization Service as an immigrant and as being lawfully admitted for permanent residence and (2) who commuted from his home in Mexico to employment in the United States. The issues raised by the complaint were, of course, of vital and most serious importance not only to the intervenor commuters but to all commuters, both Mexican and Canadian. The court granted intervention January 29, 1962. (J.A. 36).

The affidavits of the Intervenors, attached to their answer filed with the District Court, disclose the overwhelming hardship that would result to Mexican commuters if they were to lose their status and rights. (J.A. 42-66). As disclosed by the affidavits, commuters have been working in this country, some continuously,

since 1927. They have wives, children, parents, and other relatives in Mexico who are entirely dependent upon them for support. Many members of these families would be ineligible to come into the United States if the commuter were to lose his right to commute and the commuter would financially be unable to support two homes.[5]

In acquiring their rights and status, commuters have been advised by United States immigration officials that it is not necessary for them to have actual residence in the United States. (J.A. 51). The commuters have relied upon these representations of United States officials and have fashioned their lives and those of their dependents around the right to commute. To take this right away would result in overwhelming hardship to commuters and their dependents.

The Commuter Program is Part of the Foreign Relations of the United States

An affidavit of the United States Secretary of State Dean Rusk filed with the District Court in this action points up the fact that the issues raised in this suit have a direct bearing upon the foreign relations of the United States with its neighbors, Mexico and Canada, and with other nations. The Secretary of

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[5] An indication of this hardship may be gained by reading the affidavits of the Intervenor Appellees. The hardship to Tomas Alvarado (Lugo) is typical. His affidavit discloses: "That he supports in Mexico his wife, six children and his mother who is old. That he is employed in El Paso, Texas as a polisher. That if he were to lose his right to commute, it would work great personal and economic hardship on himself and his family; that he would be financially unable to bring all whom he supports to the United States, and that he would be unable to support two homes." (J.A. 42).

State, in his affidavit, dated November 5, 1962, concluded:

> ". . . it is my opinion that a judgment on the merits in this case would be undesirable from the standpoint of the foreign relations of the United States. A decision which resulted in a sudden change in the commuter practice at our borders would adversely affect our relations with Mexico, with Canada, and perhaps with other nations of the Western Hemisphere." (J.A. 85).

The Secretary also stated in connection with the commuter practice as follows:

> "In my judgment the present practice with regard to commuters across the United States-Mexican border contributes to the friendly relations between the United States and Mexico. . . .
>
> ". . . In a very real sense, the cities along the border—for example, El Paso and Juarez, Eagle Pass and Piedras Negras, Laredo and Nuevo Laredo, Brownsville and Matamoros, and San Diego and Tijuana—have grown into single economic communities. A disruption in the life of these communities would do real harm to good neighbor relations in the area.
>
> * * * * *
>
> "Because of the size and influence of Mexico in Latin America, the success of the Alliance for Progress will depend in large measure on the achievement of this program in Mexico. The harm to United States-Mexican relations which I believe would be the result of a termination of the commuter practice could seriously jeopardize the Alliance for Progress in Mexico, and thus in all Latin America.
>
> "The present practice with regard to commuters is in effect not only at the border between the

United States and Mexico, but also at the border between the United States and Canada. The Government of Canada, like the Government of Mexico, has expressed its concern over the present litigation, and an adverse decision could also adversely affect our relations with Canada and the status of United States nationals and property employed in that country. (J.A. 83-85).

The Commuter Program Also Bears Upon Domestic "Political" Issues

The Congress in enacting the Immigration and Nationality Act of 1952 established a Joint Committee on Immigration and Nationality Policy whose function it would be to make a continuous study of the administration of the Immigration and Nationality Act of 1952. § 401(a), 8 U.S.C. § 1106(a), (App. A, p. 1a). The committee is to continuously review the effects of the administration of the immigration provisions of the Act "on the national security, the economy, and the social welfare of the United States." § 401(d), 8 U.S.C. § 1106(d). (App. A, p. 1a).

The Congress is well aware of the commuter program. In fact, the Congress is presently studying the question of "commuter workers". See Staff of Sub-Comm. No. 1, House Comm. on the Judiciary, 88th Cong., 1st Sess., Study of Population and Immigration Problems, Administrative Presentations (III), Admission of Aliens Into the United States for Temporary Employment, and "Commuter Workers" (Comm. Print. 1963). We submit that the political considerations involved in immigration questions such as the classification to be afforded commuters should be left with the Congress. The courts have traditionally

refrained from considering questions of immigration policy.[6]

Petitioners Have Not Exercised Their Administrative Remedy

Petitioners have an administrative remedy. Petitioners, however, have been silent about their administrative remedy. Instead, they have sought a judicial remedy.

The Immigration and Nationality Act of 1952 provides a means of restricting the number of new aliens who may acquire the commuter status. The statute provides that the Secretary of Labor may upon making certain specified determinations under the authority of Section 212(a)(14), 8 U.S.C. § 1182(a)(14), issue a certificate to the Secretary of State and to the Attorney General, and once such a certificate has been issued aliens falling within the scope of the certificate (and who would otherwise enter as "immigrants") are excluded from the country. The Secretary of Labor may issue such certificate in circumstances where he determines that:

> "(A) *sufficient workers in the United States* who are able, willing, and qualified *are available* at the time (of application for a visa and for admission to the United States) and place (to which the alien is destined) to perform such skilled or unskilled labor, or (B) *the employment of such aliens will adversely affect the wages and working conditions of the workers in the United States similarly employed.*" (Emphasis supplied)

[6] "The conditions for entry of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification . . . have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 596-7 (1952) (concurring opinion).

The Secretary of Labor has in the past issued certificates under the authority of Section 212(a)(14). See *Amalgamated Meat Cutters* v. *Rogers*, 186 F. Supp. 115 (D.D.C. 1960). Petitioners omit entirely from their Petition reference to the available administrative remedy. Petitioners, instead, seek a judicial remedy.

ARGUMENT

I

Petitioners' Case "On the Merits" Is Fatally Defective

Petitioners' entire case "on the merits" consists, in substance, of two contentions, neither one of which is valid. Petitioners' contentions are:

(1) That since commuters do not establish permanent residence in the United States, they cannot be considered as "lawfully admitted for permanent residence" under Section 101(a)(20) of the 1952 Immigration and Nationality Act, 8 U.S.C. § 1101(a)(20), and, accordingly, they cannot be classified as "immigrants," and

(2) That commuters should be classified as "non-immigrants," falling into the newly created category of "non-immigrants" provided for by Section 101(a)(15)(H) of the 1952 Act, 8 U.S.C. § 1101(a)(15)(H).[7]

[7] Petitioners also rely on the interlocutory opinion of Judge Youngdahl in *Amalgamated Meat Cutters* v. *Rogers*, 186 F. Supp. 144 (D. C. 1960) denying the Government's motion for dismissal or summary judgment. The facts in that case are entirely different from the facts in this case. The plaintiff union there was seeking an injuction in connection with a certificate issued by the Secretary of Labor under the authority of Section 212(a)(14). No certificate is involved in the instant case. The final order in the action was entered by Judge Walsh. It did not mention or refer to Judge Youngdahl's ruling. Since the number of commuters involved had

With regard to the first contention, it is Petitioners' theory that the statutory definition of the term "lawfully admitted for permanent residence," as set forth in the introductory definitions portion of the 1952 law, creates a requirement that an immigrant so classified must establish permanent residence in the United States.

Section 101(a)(20) provides:

> "The term 'lawfully admitted for permanent residence' *means the status of having been lawfully accorded the privilege* of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." (Emphasis supplied).

Petitioners would have the court ignore entirely the fact that the statutory definition talks in terms of the *privilege* of residing permanently in the United States. This statutory definition dovetails precisely with the practice of the United States Immigration Service for a period of 25 years prior to the 1952 enactment. Since 1927 commuters had been regarded and classified by the U.S. Immigration Service as immigrants "lawfully admitted for permanent residence." *Matter of H— O—*, 5 I. & N. Dec. 716 (1954); *Matter of L—*, 4 I. & N. Dec. 454 (1951). Commuters were consistently afforded the privilege of residing permanently in the United States. There was no requirement that the privilege be exercised. Petitioners allege that the definition quoted above changed prior practice and

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dwindled to four, the case was virtually moot and no appeal was taken. Staff of Sub-Comm. No. 1, House Comm. on the Judiciary, 88th Cong., 1st Sess., Study of Population and Immigration Problems, Administrative Presentations (III), Admission of Aliens Into the United States for Temporary Employment, and "Commuter Workers" (Comm. Print. 1963), p. 179.

established permanent residence in the United States as a *sine qua non* for acquiring and maintaining the status of an "immigrant." Petitioners disregard the plain meaning of the words of the statute. The word "privilege" is entirely overlooked. When Congress wants to make residence in the United States a requisite for acquiring a status or rights under the Immigration and Nationality Act it knows how to do so and it does so in clear, specific language. For example, Congress has established residence as a requirement for naturalization. The language of the statute is clear. See Section 316(a), 8 U.S.C. § 1427(a). (App. A, p. 2a). If prior law was to be changed, the commuter practice to be abandoned, the rights and status acquired by commuters under the 1924 Act to be taken away, and permanent residence to be required as a requisite of "immigrant" status, we submit Congress would have said so.

With regard to the second contention, it must likewise be rejected. Petitioners argue that commuters should be classified as non-immigrants in the new class of "non-immigrants" created by Section 101(a)(15)(H) of the 1952 Act, which class is as follows:

> "an alien having a residence in a foreign country which he has no intention of abandoning . . . (ii) who is coming temporarily to the United States to perform other *temporary services or labor,* if unemployed persons capable of performing such service or labor cannot be found in this country . . ." (Emphasis supplied.)

This new category of non-immigrants was created to take the place of the "contract labor" provisions excluding such laborers, contained in prior immigra-

tion laws, but which were deleted from the 1952 Act. The legislative history states on this point:

> "Those provisions in existing law relating to the exclusion of contract laborers . . . are omitted from the bill in view of the adoption of . . . permits for temporary residence on the basis of the need for the labor and services of aliens." H. Rep. No. 1365, 82d Cong., 2d Sess. (1952), U.S. Code Cong. and Adm. News, at p. 1705.

To argue that commuters fall within this newly created class is to fly in the face of 37 years of judicially approved administrative practice. The words "temporary service or labor" have a fixed meaning in immigration law. In 1927 the Immigration Service established the position that a person engaged in regular employment in the United States was not coming to the United States to perform "temporary services." This position was challenged and the United States Supreme Court in *Karnuth* v. *United States ex rel. Albro,* 279 U.S. 231 (1929), upheld the Immigration Service on that very point. The 1952 Act did not change this long standing practice. A person regularly engaged in employment in the United States is not coming to perform "temporary services or labor." See *Matter of H— O—*, 5 I. & N. Dec. 716, 717 (1954); *Matter of M—*, 6 I. & N. Dec. 533 (1955) where the Board of Immigration Appeals stated:

> "The business for which the alien is coming [if he is to be classified as a non-immigrant] must be temporary and not continuing or permanent in character; *not only the visit but the business must be of temporary character.*" [Bracketed material and emphasis supplied.]

II

The Decision Below On The Issue Of Standing Is Correct And In Accord With Decisions On This Issue

The court below found that Petitioners did not have standing to bring this suit. The court held, in effect, that the injuries alleged (and allegedly resulting from the "improper" classification of commuters), e.g., unemployment,[8] reduced wages,[9] difficulties in organizing labor,[10] and animosity between the United States and Mexico,[11] did not create standing in Petitioners.

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[8] In the Petition at footnote 5, p. 7, there are set forth rates of unemployment for six Texas counties along the Mexican border as shown by the *1962 County and City Data Book*, U.S. Department of Commerce Bureau of the Census. At the oral argument in the District Court, Intervenor Respondents urged the court to take judicial notice of the fact that the same source showed that other counties in Texas nowhere near the Mexican border had comparable or greater rates of unemployment. Intervenor Respondents also urged the court to take judicial notice of the publication of the U.S. Department of Labor entitled *Area Labor Market Trends*, December 1962 Supplement. Page 25 thereof shows that the worst areas of unemployment in Texas are not along the Texas-Mexican border.

[9] In the Petition at footnote 6, p. 7, and elsewhere, Petitioners seek to create the impression that low wages prevail in the Texas border towns. To do so, Petitioners rely on a Department of Labor Report prepared by a Mr. Parnass. On November 5, 1962, Intervenor Respondents in "Intervenor's Statement of Genuine Issues in Opposition to Plaintiffs' Motion For Summary Judgment" pointed out that Mr. Parnass had no personal knowledge of the facts contained in the report and argued that the report was inadmissible in evidence and not proper material for consideration by the court. (J.A. 89-90). Furthermore, the Secretary of Labor never did issue a 212(a)(14) certificate on the basis of Mr. Parnass' report. (J.A. 86-87).

[10] The Intervenor Respondents include union members. (J.A. 47, 52, 53 and 57).

[11] See the Affidavit of the United States Secretary of State Dean Rusk (J.A. 83-85).

Petitioners might be described as "outsiders" with respect to the question of the classification conferred on an individual alien or class of aliens by the U. S. Immigration Service. The decisions are in complete unanimity that such "outsiders" have no standing. Such third persons have:

> "no enforecable right to have a particular alien or class of aliens admitted or excluded." *Braude* v. *Wirtz,* Civil No. 63-1459-TC, S.D. Cal., June 1, 1964.

As was held in *Ferrer* v. *Fronton Exhibition Co.,* 188 F. 2d 954 (5th Cir. 1954),

> ". . . While the plaintiffs, like any other citizens, are entitled to the benefits of the statute [the 1952 Immigration Act] generally, it confers no specific rights which are individual or personal to the plaintiffs to have any particular alien or class of aliens excluded . . ." (at 956) (Bracketed material supplied).

If the law were otherwise, religious groups, ethnic groups, geographical areas, political parties, employer groups, professional societies, etc., might all seek to assert judicially their private views on administering the immigration laws and classifying aliens.[12]

The decision of the court below on the standing issue is in complete accord with the recognized principle that mere economic competition made possible

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[12] Even Section 106 of the Immigration and Nationality Act of 1952, as added in 1961, 8 U.S.C. § 1105a (Supp. 1963), which recognizes the right of the individual alien to seek judicial review of an order of exclusion or deportation, does so to a limited extent only. See H. Rep. No. 1086, 87th Cong., 1st Sess., (1961) U.S. Code Cong. & Adm. News, at p. 2966-2977. Cf. *Rusk* v. *Cort,* 369 U.S. 367 (1962).

by governmental action does not give standing to sue. *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118 (1939); *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938); *Kansas City Power & Light Co.* v. *McKay*, 96 U.S. App. D.C. 273, 225 F. 2d 924, cert. denied, 350 U.S. 884 (1955).[13]

Petitioners allege that there is a conflict between the decision below and certain cases which Petitioners cite. We submit that this is not so. An analysis of the cases cited by Petitioners will show that each of them is readily distinguishable from the decision below. Either the cases cited were decided under acts which, unlike the Immigration and Nationality Act, contain a "person aggrieved" or "adversely affected" provision conferring standing on persons who otherwise would not have standing, *FCC* v. *NBC*, 319 U.S. 239 (1943); *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4 (1942); *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *International Union of Electrical Workers* v. *United States*, 108 U.S. App. D.C. 97, 280 F. 2d 645 (1960); and *National Coal Ass'n.* v. *Federal Power Commission*, 89 U.S. App. D.C. 135, 191 F. 2d 462 (1951), or the legislative or administrative action complained of was directed specifically at some right or interest of the party bringing suit. *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 283 (1961); *City of Chicago* v. *Santa Fe Ry.*, 357 U.S. 77, 83 (1958); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 140-141 (1951); *Copper Plumbing & Heat-*

[13] Furthermore, the fact that the instant decision is consistent with the prevailing law is illustrated by its citation by other courts. *Pennsylvania R.R.* v. *Dillon*, Civil No. 17753, D.C. Cir., June 26, 1964; *Braude* v. *Wirtz*, Civil No. 63-1459-TC, S.D. Cal., June 1, 1964.

ing Co. v. *Campbell,* 110 U.S. App. D.C. 177, 290 F. 2d 368 (1961); and *Atchison, Topeka and Santa Fe Ry.* v. *Somerfield,* 97 U.S. App. D.C. 325, 229 F. 2d 777 (1955).

Intervenor Respondents submit that the granting of a writ of certiorari in this action would serve no useful purpose. The decision of the court below was a proper one. That decision was in accord with recognized principles with regard to standing. The court below felt that it was not necessary to reach the question of the merits of Petitioners' case. We agree. However, we submit that a consideration of the Petitioners' case on the merits discloses that it is fatally defective.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 15, 1964

APPENDIX A

Additional Statutes Involved

The following additional provisions of the Immigration and Nationality Act (Act of June 27, 1952, 66 Stat. 163, 8 U.S.C. §§ 1101 *et seq.*) are also involved:

8 U.S.C. § 1106 [Sec. 401]. Joint Congressional Committee-Composition

(a) There is established a joint congressional committee to be known as the Joint Committee on Immigration and Nationality Policy (hereinafter referred to as the "Committee") to be composed of ten members as follows: (1) five members who are members of the Committee on the Judiciary of the Senate, three from the majority and two from the minority party to be appointed by the President of the Senate; and (2) five members who are members of the Committee on the Judiciary of the House of Representatives, three from the majority and two from the minority party to be appointed by the Speaker of the House of Representatives.

* * * * *

FUNCTIONS

(d) It shall be the function of the Committee to make a continuous study of (1) the administration of this chapter, and its effect on the national security, the economy, and the social welfare of the United States, and (2) such conditions within or without the United States which in the opinion of the Committee might have any bearing on the immigration and nationality policy of the United States.

REPORTS

(e) The Committee shall make from time to time a report to the Senate and the House of Representatives concerning the results of its studies together with such recommendations as it may deem desirable.

8 U.S.C. § 1427 [Sec. 316]. Requirements of naturalization-Residence

(a) No person, except as otherwise provided in this sub-chapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediatey preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has residered continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the period referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

APPENDIX B

MATTER OF M—D—S—&L—G—&W—D—C—

In EXCLUSION Proceedings

A-11135619
A-11132260
A-10367389

Decided by Board December 12, 1958

Resident alien—"Commuter"—Commuter status lost when alien has been out of employment for 6 months regardless of validity of Form I-151 as reentry document.

Regulation authorizing use of Form I-151 as reentry document for resident alien who has been absent from United States for period not exceeding one year does not cause any change in long-standing rule relating to commuters.

Loss of commuter status as occurs, as before, when the alien has been out of employment in the United States for more than 6 months. (Cf. *Matter of L——*, 4 I. & N. Dec. 454, and *Matter of H——O——*, 5 I. & N. Dec. 716.)

EXCLUDABLE: Act of 1952—Section 212(a)(20) (8 U.S.C. 1182(a)(20))—No visa, no passport.

BEFORE THE BOARD

DISCUSSION: The cases come forward on appeal from the District Directors at Detroit, Michigan, and at Buffalo, New York, from decisions rendered by two special inquiry officers on September 12, 1958, September 29, 1958, and October 6, 1958, directing that the applicants be admitted as Canadian resident commuters. The cases have been combined inasmuch as they involve a common set of facts and point of law.

* * * * *

The applicants belong to a class known as commuters, namely, aliens who are lawfully admitted for permanent residence but continue to retain their place of residence in foreign contiguous territory while commuting to their place of employment in this country. This anomalous class of immigrants known as "commuter" is fully treated in *Matter of L——*, 4 I. & N. Dec. 454. After the enactment of the Immigration and Nationality Act, since that act was silent with regard to commuters, it was again necessary to consider the question and it was decided in *Matter of H——O——*, 5 I. & N. Dec. 716, that this long-standing practice had not been disturbed by the enactment of the new act.

In numerous cities along the international boundary lines to the north and to the south of the United States live many aliens who each day journey to their jobs on the American side of the border and at the end of the same day usually return to their homes on the other side of the

frontier. At the same time there exists a somewhat smaller daily movement of American to and from jobs in Canada and Mexico. This flow of aliens across the frontier posed no administrative difficulty until the passage of the Immigration Act of 1924 which laid down universal rules for documentation and classified all arriving aliens as immigrants unless they fell into certain designated groups described as nonimmigrants. Until April 1, 1927, they were permitted to enter as border crossers without having been admitted for permanent residence. However, on that date the policy was changed by the issuance of General Order No. 86, which provided that such aliens entering the United States subsequent to June 30, 1924, to engage in employment or to seek employment would not be considered as visitors for business or pleasure but as aliens of the immigrant class and granted them a reasonable period of time not to exceed 6 months from June 1, 1927, within which to obtain immigration visas if they had been enjoying the border-crossing privilege on April 1, 1927. The legality of General Order No. 86 was sustained in the case of *Karnuth* v. *United States ex rel. Albro*, 279 U.S. 231 (1929). Although General Order No. 86 was later cancelled, the rights accrued thereunder were not cancelled and subsequent regulations provided that alien commuters should be considered aliens of the immigrant class (former 8 CFR 110.6. previously paragraph 1, subdivision C of Rule 3, Immigration Laws and Rules of January 1, 1930). The adoption of the policy found in General Order No. 86 aroused controversy and apprehension along the Canadan and Mexican borders and fears that the means of livelihood of the commuter would be jeopardized if access to their jobs were shut. Representations on high diplomatic levels were made and out of these discussions there eventually emerged an amplification of our policy which permitted alien commuters to establish lawful admission into the United States for permant residence, then furnished them with border-crossing identification cards and permitted them to cross international boundary en route to and from their em-

ployment (former 8 CFR 166). A memorandum from the Commissioner General (File 55499/537-A, November 16, 1927), in answer to questions raised by General Order No. 86 set forth the policy that an alien residing in foreign contiguous territory and enjoying the border-crossing privilege abandons such right when he discontinues his employment in the United States and does not renew same within a period of 6 months.

Thus, it has been held that an alien of the immigrant commuter class who has been out of employment in the United States for 6 months is, notwithstanding temporary entries in the meanwhile for other than employment purposes, deemed to have abandoned his status of a permanent resident in the United States and thereafter, if he seeks to reenter, is not admissible without again qualifying for admission as a permanent resident (*Matter of L——*, 4 I. & N. Dec. 456). The salient points to be considered in determining abandonment of commuter status are intention and loss of employment. It has been held that a commuter remains entitled to such classification, notwithstanding an absence of 6 months from this country and interruption of his work for that period, if his employment, job or position has not been lost and if the interruption was due to uncontrollable circumstances, such as serious illness, pregnancy, or a disabling injury, such as a broken arm, in which case the 6-month period tolls until the commuter is against employable.[1]

A commuter who has been legally admitted as an immigrant is entitled to receive a border-crossing identification card so long as he continues in the status of a commuter (*Matter of H——O——*, 5 I. & N. Dec. 718). The commuter situation manifestly does not fit into any precise category found in the immigration statutes. The status is an artificial one, predicated upon good international relations maintained and cherished between friendly neighbors.

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[1] *Matter of D——C——*, 3 I. & N. Dec. 526, 527, Editor's note.

As examples of the anomalous situation of the commuter, he cannot claim naturalization benefits since the naturalization statute by definition equates residence with domicile rather than an assimilated status (*Petition of Wright*, 42 Supp. 306; *In re Barron*, 26 F.2d 106 (1928); *Petition of Correa*, 79 F. Supp. 265 (1948)). It has also been held that a commuter is not a resident of the United States under the Selective Service regulations (32 CFR 611.13(a)(6), 611.13 (b)(7), (1944)), because he did not reside in the United States for the required period of 3 months. On the other hand, an alien who has the status of a commuter must notify the Commissioner of his current address in compliance with section 35 of the Alien Registration Act of 1940, as amended, and regulations issued thereunder.

However, as part and parcel of this policy has been the holding that the commuter who has been out of employment in the United States for 6 months is, notwithstanding temporary entries in the meanwhile for other than employment purposes, deemed to have abandoned his status of a permanent resident in the United States and thereafter, if he seeks to reenter, is not admissible without again qualifying for admission as a permanent resident. Thus, in *Matter of D——C——*, 3 I. & N. Dec. 519 (1949), the alien, a native and citizen of Canada, was admitted to the United States for permanent residence on May 25, 1948, and on the same date was issued a resident alien's border-crossing identification card, the validity of which expired on May 22, 1949. He returned to Canada on the same date of his admission and had no intention of residing here and never had employment here but merely made several temporary visits always with the intention of returning to his home in Canada. On December 13, 1948, during the period of validity of his resident alien's border-crossing identification card, he sought to enter for the purpose of seeking employment. His possession of the unexpired resident alien's border-crossing card did not avail him when seeking admission as an immigrant because he was not con-

sidered as a returning legal resident within the purview of section 4(b) of the Immigration Act of 1924. It is to be noted that in that case the applicant was not in fact a commuter because he had never been employed in this country and had not been employed for a period of more than 6 months prior to his application for admission with the border-crossing card. Thus, it would appear that a commuter is entitled to readmission as a returning resident, but that the primary consideration is that he maintain the status of a commuter. As a corollary requirement, he must also comply with the conditions controlling the use of border-crossing cards.

In the instant cases, the applicants had been employed in the United States for periods of approximately 2 weeks, 5 weeks and 5 months, respectively. Their jobs were then terminated. Since that time all of the applicants have been employable for more than 6 months but have been unable to obtain work in the United States during that period. At least one has done odd jobs in Canada and two have no assurance of resuming their jobs.

The circumstances presented here differ from those in *Matter of L——*, 4 I. & N. Dec. 454. There the applicant had been steadily employed in the United States by one firm for 25 years, was disabled by illness for 5 months and sought entry into the United States 6 months and 1 week after he was absent from his job to resume his employment. In view of the fact that there was no evident intention to abandon commuter status, that he had never lost his job which was being held open and was available to him during the period of his absence, that the illness tolled the 6-month period until he was again employable, he was admitted as a returning resident. In the cases before us, it is evident that the previous employment in the United States had been lost and were not available during the 6 months or more of unemployment. Under the historical policy set out above, they are no longer to be regarded as possessing the status of commuters and

the fact that their resident alien's border-crossing card or its substitute, the Alien Registration Receipt Card, Form I-151, may still be valid does not avail the applicants inasmuch as they are not eligible for the commuter status. The appeals of the district directors will be sustained and exclusion will be ordered.

ORDER: It is ordered that the appeals of the district directors from the decisions of the special inquiry officers be sustained and that the aliens be excluded on the documentary grounds set forth in the caption.

APPENDIX C

IN THE MATTER OF H—— O——

In EXCLUSION Proceedings

A-7675485

Decided by the Board March 16, 1954

Commuters—System of admission not changed by Immigration and Nationality Act.

The practice of considering commuters as permanent residents has not been disturbed by the Immigration and Nationality Act of 1952, but rather it has been impliedly approved by the Congress since the legislative history of the act reveals a discussion without dissent.

EXCLUDABLE:

Act of 1952—Section 212 (a) (20)—No immigrant, visa no passport.

BEFORE THE BOARD

DISCUSSION: This case is before us on appeal from a decision of the special inquiry officer dated October 14, 1953, excluding the alien on the above-stated ground. Appellant, a 40-year-old native and citizen of Mexico, sought admission to the United States at Calexico, Calif., on October 13, 1953, for 1 day in order to proceed to his regular employment in this country. He was originally

admitted for permanent residence at Calexico on June 18, 1942, and has since worked in this country and lived in Mexicali, B. C., Mexico.

The instant case clearly poses the question of whether the Immigration Act of 1952 (66 Stat. 163; 8 U.S.C. 1101) has restricted, changed or otherwise limited the long established system of commuter admissiions. Many aliens living near tl e border in Canada and Mexico have long had the habit of commuting daily to employment in the United States. Only after immigration was restricted under the act of 1924 (43 Stat. 153; 8 U.S.C. 201) was the present scheme of initially admitting commuters as immigrants for permanent residence commenced by Immigration Service General Order 86 (April 1, 1927). Since that time, it has been continued administratively (CF., 8 C.F.R. 110.6)[1] with the system being recognized in the legislative history of the Immigration Act of 1952.[2] These discussions reveal no congressional dissatisfaction with the commuter procedure.

Since section 101 (a) (15) (B)[3] of the act of 1952 has not changed the statutory provisions governing nonimmigrant temporary visitors, commuters may not be admitted

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[1] *Aliens coming for employment while residing in contiguous territories: classification.*—Aliens entering the United States to engage in existing employment or to seek employment in this country and who desire to continue to reside in foreign contiguous territory will be considered as aliens of the immigrant class.

[2] S. Rept. 1515, 81st Cong., 2d sess., p. 535; S. Rept. 1137, 82d Cong., 2d sess., p. 4; H. Rept. 1365, 82d Cong., 2d sess., p. 32.

[3] The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

• • • • • • • • • • • •

B. An alien other than one coming for the purpose of study or of performing skilled or unskilled labor or as a represenative of a foreign press, radio, film or other foreign information media coming to engage in such vocation having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure.

under this section any more than they were eligible for admission under section 3 (2)[4] of the act of 1924. Nor has section 101 (a) (15) (H) specifically changed the administrative practice for commuter admissions. However, although section 101 (a) (15) (H) has added a new statutory class of nonimmigrants, alien commuters as persons coming to the United States to engage in regular employment are not included in this group of aliens coming here temporarily or to perform temporary services.

In the past, commuters upon admission for permanent residence were issued resident alien's border crossing idenitfication cards (8 C.F.R. 166[5]), were permitted to continue to reside abroad, and were treated as returning resident aliens at each entry. The procedure for issuance of border crossing cards is substantially the same under 8 C.F.R. 211.11[6] as under 8 C.F.R. 166. In addition, regulations issued under authority of sections 103 and 211 (b) provide for waiver of documents for an alien returning after a temporary visit of six months or less in Canada or Mexico, if a valid resident alien's border crossing identification card is presented (8 C.F.R. 211.2 (c) (1)[7]).

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[4] When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except * * *.

(2) An alien visiting the United States temporarily as a tourist or temporarily for business or pleasure.

[5] See appendix A.
See also, 8 C. F. R. 176.202 (d), issued under act of 1924.

[6] See appendix B.

[7] *Immigrant not required to present visas or passports.*—Immigrants of the following-described classes applying for admission to the United States need not present visas or passports: * * *

(c) Aliens (including alien crewmen) of the following-described classes who have been lawfully admitted for permanent residence, who are otherwise admissible, and who are returning after a temporary absence:

(1) An alien who is returning to the United States after a temporary absence of not more than 6 months in Canada or Mexico only, and who presents a valid unexpired resident alien's border crossing identification card.

Under the 1952 act, the meaning of lawful admission for permanent residence in section 101 (a) (20)[8] is interrelated to the definition of the border crossing identification cards in section 101 (a) (6)[9] and the grounds for readmission of aliens after temporary visits abroad under section 211 (b). Actually the praseology of section 101 (a) (20) is very similar to 8 C.F.R. 176.101 (n),[10] under which the system of commuted admissions flourished. Even if the definition of "residence" in section 101 (a) (33)[11] is considered in conjunction with the provisions of section 101 (a) (20), it does not in fact change the status of the commuter.

The phrase admission for permanent residence continues to refer to a status by which the alien is granted the privileged of residing in the United States permanently as an immigrant upon lawful admission. Thus, a commuter who has been legally admitted as an immigrant is entitled to receive a border crossing identification card so long as he continues in that status. Similarly, a commuter is entitled

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[8] The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the Immigration laws, such status not having changed.

[9] The term "border crossing identification card" means a document of identity bearing that designation issued to an alien who is lawfully admitted for permanent residence, or to an alien who is a resident in foreign contiguous territory, by a consular officer or an immigration officer for the purpose of crossing over the borders between the United States and foreign contiguous territory in accordance with such conditions for its issuance and use as may be prescribed by regulations.

[10] "Lawful permanent residence of the United States" means an alien who has been lawfully admitted into the continential United States, the Virgin Islands, Puerto Rico, or Hawaii of permanent residence therein, and who has since such admission maintained his domicile in the United States

[11] The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. • • •

to readmission under section 211 (b)[12] as a returning resident while he maintains this status and complies with conditions controlling the use of border crossing cards. 8 C.F.R. 211.11, 211.2 (c) (1).

It is therefore concluded that the practice of considering commuters as permanent residents has not been disturbed by the act of 1952, but rather it has impliedly received congressional approval, since the legislative history of the act reveals a discussion without dissent. Without clear statutory language requiring a mandatory change in the commuter scheme, the law cannot be construed as prohibiting this procedure.[13]

For these reasons, the ground of exclusion is not supported and the appeal is sustained.

ORDER: It is hereby ordered that the appeal be sustained and the alien admitted as a commuter.

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[12] Notwithstanding the provisions of section 212 (a) (20) of this act, in such cases or in such classes of cases and under such conditions as may be by regulations prescribed, otherwise admissible aliens lawfully admitted for permanent residence who depart from the United States temporarily may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigration visa, reentry permit or other documentation.

[13] Cf., *Matter of D—— C——*, A-6926895, 3, I. & N. Dec. 519 (B. I. A. June 29, 1949); *Matter of F——*, A-6300563, 3, I. & N. Dec. 526n (*Editor's note*) (Atty. Gen. Jan. 3, 1947). The fiction of a commuter's permanent United States residence coinciding with his place of employment was recognized judicially in *Petition of Correa*, 79 F. Supp. 265 (W. D. Tex., 1948). In that case, however, the court pointed out that this residence could not supply the need for an actual residence in this country if such actual residence was specifically required by immigration and nationality laws. The issue in the *Correa* case was one of naturalization.

Appendix A

Immigration regulations concerning border crossing identification cards as of June 27, 1944.

Sec. 166.1 *Resident alien's border crossing identification card; qualifications to obtain.*—A resident alien's border crossing identification card may be issued to any alien who, upon application therefor, submits satisfactory evidence that he (1) has been legally admitted to the United States for permanent residence and has not relinquished the status of a permanent resident, (2) has complied with the applicable provisions of the Alien Registration Act, 1940, and (3) has a legitimate purpose and reasonable need to make a temporary visit or visits to Canada or Mexico, with no single visit to exceed a period of 6 months: *Provided, however,* That no uch card shall be issued nor shall any such card previously issued be renewed unless the applicant or holder thereof is a person who is permitted to depart from the United States under the terms of laws, regulations, Executive orders, or other governmental restrictions regulating the departure of aliens from the United States in effect at the time application for such card or renewal thereof is made. (Amended October 22, 1951, 16 Fed. Reg. 9633; May 30, 1952, 17 Fed. Reg. 4921.)

Sec. 166.4. *Resident alien's border crossing identification card; use.*—The rightful holder of a valid resident alien's border crossing identification card issued under section 166.3 may present that document in lieu of an immigration visa or reentry permit when applying for admission at any land, water, or airport of entry in the continental United States or Alaska as a returning legal resident after an absence from the United States of not more than 6 months, provided that during such absence he shall not have visited any foreign territory other than Canada or Mexico. The presentation of a resident alien's border crossing identification card shall not otherwise relieve the applicant from establishing that he is not subject to exclu-

sion from the United States. (Amended May 14, 1950, 15 Fed. Reg. 2076; May 30, 1952, 17. Fed. Reg. 4921.)

Appendix B

Pertinent provisions of title 8, Code of Federal Regulations concerning the resident alien's border crossing identification card.

211.11 *Resident alien's border crossing identification card.*—(a) Form.—For the purposes of sections 211 (b) and 212 (a) (20) of the Immigration and Nationality Act and this part, Form I-151 (Alien Registration Receipt Card) or any outstanding valid Form I-187 (Resident Alien's Border Crossing Identification Card) shall be accepted as a resident alien border crossing identification card when in possession of and presented by the rightful holder thereof during the period of its validity.

(b) *Use.*—The presentation of such card shall not relieve the holder from establishing his admissibility to the United States under the applicable provisions of the Immigration laws and regulations. A resident alien's border crossing identification card may be used by an ailen who has been lawfully admitted to the United States for permanent residence for the purpose of (1) facilitating determination of his status as a returning legal resident when applying for admission at any land or water port of entry or international airport in the continental United States or Alaska after an absence from the United States of not more than 6 months, during which absence he visited no foreign country other than Canada, Mexico, or both, and (2) satisfying the documentary requirements of sections 211 (b) and 212 (a) (20) of the Immigration and Nationality Act and this part.

(c) *Form I-151; who may apply.*—Any alien lawfully admitted to the United States for permanent residence who is not in possession of a Form I-151 may apply for such form in accordance with the provisions of section 264.5 of this chapter.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	6
Conclusion	12

CITATIONS

Cases:

Alabama Power Co. v. *Ickes*, 302 U.S. 464	6
Amalgamated Meat Cutters and Butcher Workmen v. *Rogers*, 186 F. Supp. 114	7, 8, 10
American President Lines v. *Federal Maritime Board*, 112 F. Supp. 346	9
Associated Industries v. *Ickes*, 134 F. 2d 694, vacated as moot, 320 U.S. 707	9
Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58	6, 7
Duba v. *Schuetzle*, 303 F. 2d 570	9
Duke Power Co. v. *Greenwood County*, 302 U.S. 485	6
Federal Communications Commission v. *Sanders Radio Station*, 309 U.S. 470	9
Ferrer v. *Fronton Exhibition Co.*, 188 F. 2d 954	7
Foti v. *Immigration Service*, 375 U.S. 217	7
Gange Lumber Co. v. *Rowley*, 326 U.S. 295	10
Harrison-Halsted Community Group, Inc. v. *Housing & Home Finance Agency*, 310 F. 2d 99, certiorari denied, 373 U.S. 914	9

741-475—64——1

Cases—Continued	Page
Joint Anti-Fascist Committee v. *McGrath*, 341 U.S. 123	6
Kansas City Power & Light Co. v. *McKay*, 225 F. 2d 924, certiorari denied, 350 U.S. 884	6, 8, 9
Massachusetts v. *Mellon*, 262 U.S. 447	10
National Coal Ass'n v. *Federal Power Commission*, 191 F. 2d 462	10
Ove Gustavsson Contracting Co. v. *Floete*, 278 F. 2d 912, certiorari denied, 364 U.S. 894	9
Perkins v. *Lukens Steel Co.*, 310 U.S. 113	6, 11
Railway Express Agency v. *Kennedy*, 189 F. 2d 801, certiorari denied, 342 U.S. 830	10
Tennessee Power Co. v. *Tennessee Valley Authority*, 306 U.S. 118	6
United States Cane Sugar Refiners' Ass'n v. *McNutt*, 138 F. 2d 116	10
Statutes:	
Administrative Procedure Act, Sec. 10(a), 60 Stat. 243, 5 U.S.C. 1009(a)	8, 9
Immigration and Nationality Act, 66 Stat. 163, 8 U.S.C. 1101, *et seq.*:	
Sec. 101(a)(15)(H)	3
Sec. 106 (as added, 75 Stat. 651)	7
Section 212	2
Sec. 212(a)(14)	7
Sec. 401	8
Miscellaneous:	
House Committee on Judiciary, Subcommittee No. 1, Study of Population and Immigration Problems, Administrative Presentations (III) (1963)	8

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 182

TEXAS STATE AFL–CIO, ANTONIO AGUILAR, JULIA AMAYA, ET AL., PETITIONERS

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL, RAYMOND F. FARRELL, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS KENNEDY AND FARRELL IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 114–118, 134–135;[1] Pet. App. 23–32) is reported at 330 F. 2d 217.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1964 (R. 119), and a petition for rehearing was denied on March 18, 1964 (R. 136). The

[1] "R." refers to the joint appendix in the court of appeals which is on file with the Clerk of this Court.

petition for a writ of certiorari was filed on June 13, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners have standing to sue to compel Immigration authorities to change the status of a group of aliens who, although considered as permanent residents, are permitted to enter the United States daily and work in this country while maintaining homes in Mexico.

STATEMENT

Petitioners seek a declaratory judgment and relief in the nature of mandamus in order to revoke the status as permanent residents of a group of Mexican aliens (known as "commuting aliens")[2] who have been permitted by the Immigration authorities to enter the United States and hold down jobs in this country while maintaining their actual residence in Mexico. To grant this request would effectively bar these commuters from working in the United States while actually residing in Mexico. For, if they sought entrance as immigrants, they would be obligated each day to obtain entry visas and meet the requirements of Section 212 of the Immigration and Nationality Act, of 1952. The daily requirements would impose insuperable practical and financial burdens upon them. If, on the other hand, the commuters sought entry as

[2] In their complaint, petitioners estimated that there are in excess of 50,000 commuting aliens (R. 17). The government believes the number to be between thirty and fifty thousand (see R. 84).

non-immigrants to perform temporary services or labor, they would probably be subject to exclusion under Section 101(a)(15)(H)(ii) of the Act on the grounds that there were unemployed persons in this country capable of performing the services sought to be performed by the commuters.

The district court dismissed the complaint and the court of appeals, on the ground of lack of standing, affirmed (R. 114–118; Pet. App. 23–28; 330 F. 2d 217). The proceedings culminating in this judgment were as follows:

In October 1961 petitioners filed a complaint in the district court seeking a declaratory judgment and order in the nature of mandamus against the Attorney General and the Commissioner of Immigration and Naturalization (R. 2–23). The complaint stated that petitioners were a voluntary labor organization of Texas suing on behalf of its members and of affiliated members of organized labor, and over 180 individuals, who were residents of Texas border communities, suing for themselves and as representatives of a numerous class of persons similarly situated (R. 4–8). The complaint alleged that the Immigration and Naturalization Services had failed properly to enforce the Immigration and Nationality Act as to a group of Mexicans known as "commuting aliens." It was claimed that, in violation of the Act, these aliens had been granted permanent residence status, when, in truth, they are not entitled to such status because, although they work in this country, they actually reside in Mexico (R. 9–18); that as a consequence of this failure to enforce the Act, an abundance of

cheap labor has become available in the United States border communities producing fewer available job opportunities, unemployment, low wages, and forced migration (R. 18–19); that the individual petitioners have suffered economic hardship from unemployment (R. 19–20); and that the petitioner labor organization has suffered injury from the unemployment of its members, low wage rates, and the weakening of strikes (R. 20–21). The complaint additionally asserted that this situation has led to "animosity between the United States and its good neighbor Mexico" (R. 21). Petitioners prayed that the district court issue a judgment declaring that "commuting aliens, * * * have no legal status and are not aliens lawfully admitted for permanent residence in the United States" and that an order in the nature of mandamus issue requiring the government to cease conferring such permanent residence status upon these aliens (R. 22–23).

In answer the government stated, *inter alia,* that the alleged injury was too remote to confer standing on petitioners (R. 24–29). Attached to the answer (R. 37–41) of the intervening respondents—nineteen Mexican commuting aliens who represented themselves and other commuters (R. 30–33, 36)—were affidavits which showed that some of these aliens had been commuting between Mexico and the United States since the middle of the 1920's and that some were members of unions which were affiliated with petitioner labor organization (see R. 46, 47–48, 50, 52–53, 56–57, 63).

Cross motions for summary judgment were filed by the parties, and the respondents also filed motions to dismiss (R. 80, 81–82). Attached to the government's motion to dismiss was an affidavit, dated November 5, 1962, from Secretary of State Dean Rusk in which he stated that (R. 83):

> [T]he present practice with regard to commuters across the United States-Mexican border contributes to the friendly relations between the United States and Mexico. The Government of Mexico has also undertaken to explore with the United States Government formulas that would make it possible to find a satisfactory solution for the future to the problem which gives rise to this litigation. Negotiations looking to such a solution are presently in progress. In my judgment, a sudden termination of the commuter system as the result of a court decision would have a serious deleterious effect upon our relations with Mexico.

The Secretary further pointed out that an abrupt termination of the commuter program by judicial decree would disrupt the economic unity between contiguous communities on either side of the border, and that it could lead to "compensating steps" by Mexico resulting in economic damage to the area and could "seriously jeopardize the Alliance for Progress in Mexico, and thus in all Latin America." The Secretary further stressed that the problem has not only to do with our relations with Mexico but with Canada as well (R. 84–85).

ARGUMENT

The court of appeals, without passing on the substantive issue raised by the complaint, held that petitioners were without standing. We submit that this decision is correct and does not warrant further review by this Court.

1. Petitioners' claim is, in essence, that they are injured by competition from workers illegally admitted by the government into the country. However, it is well established that government officers may not be sued because of allegedly injurious competition, which is itself lawful, merely because the competition is the result of action by officials who allegedly exceeded their authority. See, *e.g.*, *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 478–485; *Tennessee Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 137–138, 140; *Duke Power Co.* v. *Greenwood County*, 302 U.S. 485; *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924 (C.A. D.C.), certiorari denied, 350 U.S. 884. See also *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125; *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 149, 153. Petitioners have been deprived of no right belonging to them. No property has been taken from them; no contract has been violated; no tort has been committed against them; no constitutional right even conceivably belonging to them has been violated.[3]

[3] Petitioners rely (Pet. 13–14) on *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, which held that a State commission violated freedom of the press in telling book distributors that books distributed by them had been found to be obscene and that it had recommended prosecution of such distributors, without providing adequate procedures for determining whether

No provision of the Immigration and Nationality Act of 1952 even suggests that an administrative decision admitting or readmitting aliens is subject to judicial review at the behest of another private litigant. Cf. *Ferrer* v. *Fronton Exhibition Co.*, 188 F. 2d 954, 956 (C.A. 5). Indeed, in 1961, Congress amended the 1952 Act, by adding Section 106, which specifically states that it is to be "the sole and exclusive procedure" for review by an alien directly affected by a deportation order and further provides that an alien who has been ordered excluded may test that determination only by way of habeas corpus. 75 Stat. 651–653. See *Foti* v. *Immigration Service*, 375 U.S. 217. A *fortiori*, review may not be obtained by a stranger.[4]

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the books were in fact obscene. There, the Court found that the plaintiffs had standing because the State's action, if it had been private, would have been tortious and it deprived them of their own constitutional rights. *Id.* at 64–65, note 6. Here, on the other hand, the competition complained of is plainly not itself illegal or tortious; no right running to petitioners has been possibly infringed; and no constitutional rights or issues are even involved.

[4] Petitioners rely (Pet. 9–12) on *Amalgamated Meat Cutters and Butcher Workmen* v. *Rogers*, 186 F. Supp. 114 (D. D.C.), in which the Secretary of Labor had issued a certification under Section 212(a)(14) of the Act that the admission of aliens for employment at a particular company which was being struck by the plaintiff union would affect wages and working conditions of workers in the United States. The Immigration and Naturalization Service thereupon barred aliens from entering the United States for this purpose "except returning lawfully domiciled resident aliens." The district court held that the union had standing to sue to require the Attorney General to comply with the certification so as to exclude commuting aliens who, it was alleged, were being employed by the packing company as strike breakers. That case is distinguishable because petitioners are not seeking to enforce the performance of an

Congress was well aware of the possibility that the Immigration and Nationality Act might not be administered to its full satisfaction. However, it did not choose to have the public interest vindicated through suits by private litigants. Instead, it created a joint-congressional "watchdog" committee whose function it is to maintain continuous surveillance over the operation and administration of the Act and make reports and recommendations to Congress.[5] Section 401, 8 U.S.C. 1106, 66 Stat. 274–275. In short, Congress decreed that the remedy for correcting administrative inadequacies lies in corrective legislation, not in private lawsuits. See *Kansas City Power & Light Co.* v. *McKay, supra,* 225 F. 2d at 931.

Petitioners urge (Pet. 14–15) that Section 10(a) of Administrative Procedure Act, 5 U.S.C. 1009(a)—which provides for judicial review for persons "adversely affected or aggrieved" by administrative action—confers standing on them. However, the Administrative Procedure Act, while providing new remedies, did not create new rights in persons previously without standing. While *Federal Communications Com-*

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order of an executive department but instead seek to have the courts direct that such executive action be taken. Moreover, the competitive injury to the plaintiff in *Amalgamated* was far more direct and serious than that involved here (see pp. 10–11 below).

[5] Thus, the decisions in *Amalgamated* (see note 4 above) and this case have been included in a recent Congressional report and are under Congressional study. See House Committee on the Judiciary, Subcommittee No. 1, Study of Population and Immigration Problems, Administrative Presentations (III) (1963), pp. 156–160.

mission v. *Sanders Radio Station*, 309 U.S. 470, 473–477, and related cases arising under the Federal Communications Act construed similar language to confer standing, the Court there found that Congress intended competitors to bring suits in order to protect the public interest. That is a special rule applicable in a highly regulated industry endowed with particular public interest. The rule was neither based on the Administrative Procedure Act nor derived from it. Thus, those cases cannot be deemed to enlarge the reach and effect of Section 10(a) of the Act so as to make persons who disagree with any government policy "private Attorney Generals." See *Associated Industries* v. *Ickes*, 134 F. 2d 694, 704 (C.A. 2), vacated as moot, 320 U.S. 707.[6]

Even if it be assumed *arguendo* that Section 10(a) of the Administrative Procedure Act would, in certain circumstances, confer standing to challenge the admission of aliens into this country, petitioners do not have standing in the instant case. For, at the least,

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[6] The lower courts have consistently rejected such an expansive reading of Section 10(a). *Harrison-Halsted Community Group, Inc.* v. *Housing & Home Finance Agency*, 310 F. 2d 99, 104–105 (C.A. 7), certiorari denied, 373 U.S. 914; *Duba* v. *Schuetzle*, 303 F. 2d 570, 574–575 (C.A. 8); *Ove Gustavsson Contracting Co.* v. *Floete*, 278 F. 2d 912, 914 (C.A. 2), certiorari denied, 364 U.S. 894; *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 931–933 (C.A. D.C.), certiorari denied, 350 U.S. 884. A contrary ruling, relied on by petitioners (Pet. 15), *American President Lines* v. *Federal Maritime Board*, 112 F. Supp. 346, 348–349 (D. D.C.), was summarily rejected by the court of appeals in *Kansas City Power & Light Co.*, *supra*, 225 F. 2d at 932.

it is essential that the injury sought to be remedied is direct and immediate rather than remote, indefinite, or speculative. See *Massachusetts* v. *Mellon,* 262 U.S. 447, 488; *Gange Lumber Co.* v. *Rowley,* 326 U.S. 295, 305; *United States Cane Sugar Refiners' Ass'n* v. *McNutt,* 138 F. 2d 116, 119–120 (C.A. 2); *Railway Express Agency* v. *Kennedy,* 189 F. 2d 801, 805 (C.A. 7), certiorari denied, 342 U.S. 830; cf. *National Coal Ass'n* v. *Federal Power Commission,* 191 F. 2d 462, 465 (C.A. D.C.).

That no direct remediable injury is alleged in this case is illustrated by contrasting the complaint with the factual situation in the *Amalgamated Meat Cutters* case discussed above (pp. 7–8, note 4). In *Amalgamated,* the striking employees and the strike-breaking commuters were in competition for the very same jobs at the struck plant at the Peyton Packing Company in El Paso, Texas. There was, accordingly, a direct relationship between the allegedly unlawful conduct of the Attorney General in admitting the commuter aliens and the resultant economic injury to the striking employees. In sharp contrast, the alleged injury suffered by petitioners here is indirect and speculative. It is nowhere shown that the commuting aliens are in direct economic competition with petitioners for particular jobs in a specified plant, community, or even industry. The individual petitioners do not reside in any specific location nor are they employed in any particular industry. On the contrary, they are scattered over five counties of Texas (R. 5–7). On the other hand, some of the commuters reside on the Canadian as well as the Mexican side of the border

and, as pointed out in the complaint, are engaged in all types of employment from being maids to construction workers (R. 18–19).

2. The essence of petitioners' complaint is that, unless the courts act to compel Immigration authorities to enforce allegedly applicable provisions of the Immigration and Nationality Act against thousands of "commuting aliens," petitioners, and those they represent, will continue to suffer economic hardship in terms of unemployment, limited job opportunities and depressed wage scales. Thus, this is not an action which seeks a remedy affecting only the government officials named as defendants or their privies. On the contrary, petitioners request that between thirty and fifty thousand commuting aliens, no matter how close their ties to this country or how long they have been employed in the United States, be deprived of their present status.

Plainly, the litigation in this case cannot determine the status of thousands of persons not parties to it. If petitioners are successful here and Immigration authorities therefore deny permanent residence status to commuting aliens, the latter may, of course, bring suit to restore their former status. Thus, petitioners are, in reality, seeking to have the commuting aliens and the government litigate their status. They plainly have no standing to do this.[7]

[7] In *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 123, an element of this Court's finding of non-justiciability was the fact that the relief sought and granted by the court of appeals went "beyond any controversy that might have existed between the complaining companies and the Government officials."

CONCLUSION

For the foregoing reason, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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